Supreme Court, U. S.
FILED
SEP 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV AND RITA SHAEV,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August 31, 1977

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OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV AND RITA SHAEV,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners[1] respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, after rehearing en banc, reversing the determination of a three-judge panel of the Court of Appeals and affirming an order of the United States District Court for the Southern District of New York. The Court below circumvented and undercut this

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[1] Petitioners, all of whom are named defendants in this consolidated action, are two corporations (Oppenheimer Fund, Inc. and Oppenheimer Management Corp.), one partnership (Oppenheimer & Co.) and four individuals (Leon Levy, Jack Nash, Edmund T. Delaney and Emanuel Celler).

Court's decision in *Eisen IV*[2] by applying the discovery provisions of Fed. Rule Civ. Proc. 34 to impose on petitioner Oppenheimer Fund, Inc., a nominal and financially disinterested party in the class action portion of the complaints, the substantial expense of creating special computer programs to prepare a list of the names and addresses of prospective class members for the sole purpose of enabling respondents to send the initial class action notices required by Fed. Rule Civ. Proc. 23(c)(2), even though petitioners had made the existing computerized business records fully available to respondents.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 20 F.R. Serv. 2d 1218 and appears in Appendix A.

The memorandum order of the District Court entered on reargument of its opinion is unreported and appears in Appendix B.

The opinion of the three-judge panel of the Court of Appeals is reported at 21 F.R. Serv. 2d 1213 and appears in Appendix C.

The subsequent opinion of the Court of Appeals on rehearing en banc is not yet reported and appears in Appendix E.

Jurisdiction of the Court

The judgment of the en banc panel of the Court of Appeals was entered on June 22, 1977. (App. E, p. 34a.)

[2] *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*"Eisen IV"*), *vacating*, 479 F.2d 1005 (2d Cir. 1973) (*"Eisen III"*).

The order of the Court of Appeals granting respondents' petition for rehearing en banc was entered on September 14, 1976. (App. D, p. 32a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether, in a class action maintained under Fed. Rule Civ. Proc. 23(b)(3), any of the defendants can be required to bear the substantial expense of identifying and assembling the names and addresses of class members for the purpose of relieving plaintiffs of that obligation incident to sending the initial class action notice required by Fed. Rule Civ. Proc. 23(c)(2).

Statutes and Rules Involved

The following rules are involved in the determination of this case, and are set forth in full text in Appendix F:

Fed. Rule Civ. Proc. 23(a), 28 U.S.C.
Fed. Rule Civ. Proc. 23(b)(3), 28 U.S.C.
Fed. Rule Civ. Proc. 23(c)(1), 28 U.S.C.
Fed. Rule Civ. Proc. 23(c)(2), 28 U.S.C.
Fed. Rule Civ. Proc. 23(d), 28 U.S.C.
Fed. Rule Civ. Proc. 26(b), 28 U.S.C.
Fed. Rule Civ. Proc. 26(c), 28 U.S.C.
Fed. Rule Civ. Proc. 33(c), 28 U.S.C.
Fed. Rule Civ. Proc. 34, 28 U.S.C.

Statement of the Case

Respondents[3] ("plaintiffs") seek to maintain this consolidated action on behalf of a class of 121,000 current and former shareholders[4] of Oppenheimer Fund, Inc. (the "Fund") who acquired its shares between March 28, 1968 and April 24, 1970. Petitioners ("defendants") are the Fund, an open-end investment company registered under the Investment Company Act of 1940, 15 U.S.C. §80a-1 *et seq.;* Oppenheimer Management Corporation (the "Manager"), the investment adviser to the Fund; Oppenheimer & Co., a New York Stock Exchange member firm which owned all of the voting stock of the Manager; and individual directors of the Fund, some of whom were also principals in Oppenheimer & Co. or the Manager.

The complaints, which also contain derivative claims not here relevant, allege violations of Sections 12(2) and 17 of the Securities Act of 1933, 15 U.S.C. §§77*l*(2) and 77q; Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b); Rule 10b-5, promulgated by the Securities and Exchange Commission, 17 C.F.R. §240.10b-5; Sections 22, 30 and 37 of the Investment Company Act of 1940, 15 U.S.C. §§80a-22, 80a-29 and 80a-36; Rules promulgated thereunder by the Securities and Exchange Commission; and fiduciary obligations under state law.[5]

[3] Additional respondents, all of whom are named as defendants in this consolidated action, are Murray Graham, Eric Hauser, Joseph M. McDaniel, Jr. and Sidney M. Robbins. These individuals have not answered the complaints nor have they otherwise appeared in this action.

[4] Said 121,000 current and former shareholders consist of those who have a direct beneficial interest in Fund shares and those who, through a unit investment trust, have an indirect beneficial interest.

[5] The complaints posit federal jurisdiction upon the claims asserted under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act and the principles of pendent jurisdiction.

The gravamen of plaintiffs' claims is that the defendants caused the Fund to overvalue "restricted" securities in its portfolio during the relevant period, thereby inflating the price of the Fund shares sold to the public, with a consequent alleged failure to meet disclosure requirements. Plaintiffs seek to recover damages equal to the alleged overpayments from all the defendants except the Fund, which appears to have been named as a defendant only for the purposes of the derivative claims. In their amended answers, defendants deny the material allegations of the plaintiffs' complaints and assert various affirmative defenses.

On March 30, 1973, almost four years after the complaints were filed, the four plaintiffs[6] moved for an order pursuant to Fed. Rule Civ. Proc. 23(c)(1) (hereinafter cited as "Rule . . . .") for class determination on behalf of all persons who purchased Fund shares between March 28, 1968 and April 24, 1970. During examination of the Fund's transfer agent concerning procedures and costs of determining the names and addresses of the members of the prospective class as well as other matters relating to the initial class notice required by Rule 23(c)(2), it was established that the names and addresses of current and former shareholders of the Fund, including members of the class, are maintained on magnetic computer tapes in the possession of the transfer agent.[7] However, there are con-

[6] As of March 31, 1973, 67,726,541 shares of the Fund were outstanding, owned by a total of 173,000 shareholders. As of the commencement of this action, plaintiffs Shaev, plaintiff Sanders and plaintiff Taussig owned an aggregate of slightly over 2,600 shares, consisting of 45.071, 209.823 and 2,369.363 shares, respectively. Plaintiff Taussig redeemed 337.39 shares during the relevant period.

[7] The en banc panel of the Court of Appeals observed that, "in the absence of computer technology, operations so vast and complex as those of the [F]und might well be impossible to conduct." (App. E, p. 37a.) When the motion for class determination was

tinual purchases and redemptions of Fund shares, and many purchasers who acquired shares during the relevant period, April 1968 through April 1970, have redeemed their shares and are not current shareholders. Conversely, many current shareholders did not make any purchases during the relevant period.

As a consequence, the class members cannot be identified by a mere printout from the application of existing computer programs. Instead, new programs must be designed to scan computer records, and machine processes must be employed in order to extract from the existing tapes the names and addresses of purchasers who acquired shares during the relevant period. It is the cost of such new programming and additional procedures, with attendant labor costs, that make up the expense of identifying and assembling the names and addresses of members of the class. As of October 10, 1973, the transfer agent estimated the identification and assemblage costs would total approximately $16,580;[8] doubtless such costs have increased substantially in the intervening years.

The plaintiffs have unequivocally stated on the record that they will not bear the expense of the special programming necessary to identify the members of their class and that if they are required to pay such costs they will not continue to prosecute this action as a class suit.[9]

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made, there were over 173,000 shareholders. During the relevant period, daily sales and redemptions ranged from 18,549 and 16,364 shares, respectively, to 58,170 and 14,000 shares, respectively.

[8] Mailing, printing and other costs related to the sending of class notice were estimated at an additional $5,000.

[9] As is pointed out in this Court's *Eisen IV* opinion, the plaintiffs there took a similar position with respect to the costs involved in providing individualized notice to class members. 417 U.S. at 175.

During the course of the proceedings in the District Court concerning the class determination motion and after the Second Circuit had rendered its decision in *Eisen III* (approved in substance by this Court in *Eisen IV*), the plaintiffs sought to eliminate the expense of identifying and assembling the names and addresses of the class members, and thereby to reduce class notice costs to plaintiffs,[10] by a dual proposal: (i) amending the description of the class to eliminate therefrom all persons who were not shareholders at the time of mailing of the class notice and (ii) inserting the class notice in a regular mailing to be sent by the Fund to all of its current shareholders, whether or not they were members of the class. Defendants opposed this proposal on the grounds that (i) the proposed mailing of a class notice to all current shareholders would have a serious adverse effect on the Fund and its shareholders and might well precipitate substantial demands for redemption by the current shareholders, many of whom are not members of the class, and (ii) that the proposed class modification was arbitrary and improper.

Decision and Order of the District Court

In its opinion of May 15, 1975, the District Court found that this action could be maintained as a class action on behalf of the current and former shareholders originally described in plaintiffs' motion for class determination. The District Court rejected plaintiffs' proposal to eliminate members of the class who were former shareholders as arbitrary and improper, and, referring to defendants' objections based upon potential injury to the Fund and its

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[10] While the existing computer tapes and records have been available to plaintiffs, they have consistently refused to undertake the procedures necessary to identify class members at their own expense. As indicated, they have also refused to reimburse the defendants for performing such work. *Supra* at p. 6.

shareholders, declined to direct the insertion of class notice in a regular Fund mailing to all current shareholders.

Although the District Court apparently recognized that the expense of culling out and assembling the class members' names and addresses was an element of the cost of notice under Rule 23(c)(2) (App. A, pp. 2a, 7a.), it also determined that the Fund was "to be responsible for whatever work and expense is involved in providing the list of class members to plaintiff." (App. A, p. 2a.) Citing no authority for its self-arrogated discretion to impose identification costs on the Fund, the District Court asserted two reasons for its decision to do so: (i) "the expense is relatively modest" and (ii) "defendants . . . are seeking to have the class defined in a manner which appears to require the additional expense." (App. A, p. 6a.)

All parties moved for reargument, and, thereafter, on October 1, 1975, the District Court entered a Memorandum Order which directed that the cost of identifying and assembling the names and addresses of the class members should be borne by the Fund without prejudice to its right, at the conclusion of the action, to make whatever claim it would be legally entitled to make for reimbursement by other parties, and authorized the mailing of the class notice at plaintiffs' expense in a regular Fund mailing, provided the notice is sent only to class members. (App. B, p. 9a.)

The Circuit Court Three-Judge Panel Decision

In a 2-1 decision (Hays, J., dissenting), a majority of the Court of Appeals panel (Mulligan and Palmieri,[11] JJ.) reversed the District Court's order to the extent that it had imposed on the Fund the cost of ascertaining and assembling the names and addresses of the class members and held that, in accordance with this Court's decision in *Eisen IV*, the cost of identifying the members of the class must be borne in the first instance by the plaintiffs as part of the cost of providing notice to those members pursuant to Rule 23(c)(2).

[11] Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

The majority stated that the District Court's two justifications for allocating identification costs to the Fund, namely, consideration of the financial resources of the parties and defendants' position on class redefinition, were erroneous (App. C, pp. 19a-20a.); that the Fund's status, as a nominal defendant from which no recovery is sought and to which no financial benefit can result,[12] made "it totally improper to impose costs on the Fund" (App. C, p. 17a.); that there were no fiduciary relationships or other extraordinary facts in this case which would warrant shifting notice costs from plaintiffs to any of the defendants under an exception to the general rule enunciated by this Court in *Eisen IV* (App. C, pp. 18a-19a.); and finally that the federal discovery rules were not applicable to obtain class member identification for the purposes of the initial class notice, but, even if applicable, the defendants would not be required to bear the cost of identification under those rules because of the protective provisions of Rule 33(c) (App. C, pp. 21a-23a.).

The Circuit Court En Banc Decision

On application of the plaintiffs, the matter was reconsidered en banc by the Court of Appeals. A majority of the

[12] The majority stated: "since the Fund has no direct interest in the outcome of the class action claim, it is too remotely involved to have notification costs imposed upon it." (App. C, p. 18a.) The Fund's status is completely different than that of a corporate defendant in a stockholders' derivative action, wherein any damage award accrues to the benefit of the corporation.

ten-member panel (Mulligan, Meskill and Van Graafeiland, JJ., dissenting) affirmed the District Court's order directing the Fund at its own expense to create the programs necessary to identify the names and addresses of the members of the class plaintiff.

Although the issue arose under plaintiffs' Rule 23 motion for class determination and not under any discovery rule, the en banc majority stated that "it hardly require[d] . . . extended discussion to establish that" the information sought as to the identities of the class members was "within the broad scope of permissible discovery," and held that Rule 34 provided the basis for the District Court's order that the cost of producing such information be allocated to the Fund.[13] (App. E, p. 40a.)

The en banc majority's reasoning, which the dissenting judges found "bewildering", was that Rule 26 (b)(1) makes discoverable any unprivileged matter relevant to the "subject matter involved in the pending action"; that *Eisen IV* "raises as a potential issue in all such litigation whether the required notice has properly been sent"; and, accordingly, a list of the names and addresses of the class members "would of course be essential to the resolution of that issue". (App. E, p. 40a.).

The majority did not acknowledge the fact that the issue of "whether [Rule 23(c)(2)] notice has properly been sent" to all members of the class has never been raised in this case.[14] Having interjected an illusory issue, the majority

[13] Rule 34(a) in pertinent part provides:

"(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request . . . . to inspect and copy, any designated documents (including . . . data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form). . . ."

[14] The majority's failure to reconcile the non-existence in fact of this issue was criticized by the en banc dissenters. (App. E, pp. 51a-52a.) The issue could not be, and in fact was not, raised by the representative plaintiffs, or the District Court or the three-judge panel of the Court of Appeals.

concluded that class identification for the sole purpose of providing class notice is governed by the federal discovery rules and not by Rule 23(c)(2) which expressly requires identification of the members of the class, if it can be accomplished through reasonable effort, as a predicate to sending individualized notice to the class.

Further, the majority ruled that the Fund is not entitled to the protection of Rule 33(c) which allows a party answering interrogatories calling for abstracts and compilations of business records to produce its existing records from which the party seeking discovery may extract the information sought at its own expense. The Court held that, on its reading of Rule 33(c), it was "inapplicable [and] not especially tailored to the discovery problems posed by contemporary computer technology." (App. E, p. 42a.) However, on this issue, the en banc majority qualified its decision as follows: "We intimate no view as to what the result in the instant case would be if Rule 33(c) were deemed applicable." (App. E, p. 42a n.1.)

In a dissenting opinion which incisively analyzed the errors in logic, law and fact of the en banc majority, three members of the en banc panel[15] vigorously criticized the imposition of identification costs on the Fund, finding the majority opinion "illogical", "conceptually unsound" and "unprecedented", and, further, that it "flouted" the holding of this Court in *Eisen IV*. The dissenters would reverse that portion of the District Court order pertaining to identification costs for the reasons advanced in the ma-

[15] The dissenters were Circuit Judges Mulligan, Van Graafeiland and Meskill. Circuit Judge Edmund L. Palmieri sat by designation on the original panel and was the author of the majority opinion; he did not participate in the rehearing en banc.

jority opinion of the original panel, and because the en banc majority "forces the defendant[s] to subsidize the suit against them, a result which is aberrant to our jurisprudence and to the extent that it depends upon the premise that the defendant has greater financial resources is further in conflict with *Eisen IV*." (App. E, p. 48a.)

Reasons for Granting the Writ

This case raises basic federal questions concerning defendants' constitutional rights, the proper incidence of the costs of maintaining Rule 23(b)(3) class actions and the purpose and lawful scope of the federal discovery procedures. The resolution of these questions will have immediate importance in a large number of class actions and other civil suits now pending and likely to be commenced in the future.[16]

By misapplication of the federal discovery rules, the Court below required the defendant Fund to pay the substantial cost of special computer programming necessary to identify and assemble the class members' names and addresses for the purpose of the initial class notice mandated by Rule 23(c)(2).

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[16] Judge Mulligan, dissenting in the en banc opinion, stated:

> "We expect that until the Supreme Court intervenes this court will be asked to further rule on this issue. The burden is not inconsiderable. There were 176 class actions filed in the Southern District of New York alone in fiscal 1976 and at the end of fiscal 1976, 408 class actions were pending in that district. There were 724 pending at the time in all the districts of this Circuit. Total filings of class actions in United States courts increased from 2,717 in 1974 to 3,584 in 1976 with 5,987 pending at the end of fiscal 1976. Administrative Office of the United States Court, 1976 Annual Report of the Director 117-24." (App. E, pp. 54a-55a n.5.)

In addition, the questions of defendants' rights and the perimeters of discoverable information have a direct bearing on civil suits, generally, not merely class actions.

Certiorari should be granted for the following reasons:

1. The decision below directly conflicts with the decision of this Court in *Eisen IV* on the question of which party should bear the costs of the notice to class members required by Rule 23(c)(2). It will cause great confusion and burden the lower federal courts with an increased amount of vexatious litigation if it is permitted to stand without review.

2. The decision below directly conflicts with the decision of the Fifth Circuit, rendered virtually simultaneously on the same question in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977). This will cause still further confusion and vexatious litigation if it is permitted to stand without review.

3. The decision below improperly circumvents Rule 23 and *Eisen IV* by authorizing discovery beyond the scope authorized by Rule 26(b)(2), misinterprets and misapplies Rules 33(c) and 34, thereby creating an undesirable, broad precedent governing a new and important phase in the discovery of computerized information, and allocates these purported discovery costs in a wholly arbitrary and unfair manner.

I.

The Decision Below Has Improperly Circumvented the Provisions of Rule 23 of the Federal Rules of Civil Procedure and Directly Conflicts With the Decision of This Court in *Eisen IV*.

A. The Court Below Incorrectly Decided That the Cost of Identifying the Members of the Class and Ascertaining Their Addresses Is Not a Part of the Cost of the Notice Required by Rule 23(c)(2), Which This Court in *Eisen IV* Held Should Be Borne by Plaintiffs.

The en banc majority held that, in this Rule 23(b)(3) class action, the defendant Fund is required to pay more than 75 per cent of the cost that must necessarily be incurred in providing individualized notice of the action's pendency to all members of the class. This is in direct conflict with this Court's *Eisen IV* holding that, in such litigations, "the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Eisen IV*, 417 U.S. at 179.

Although the majority paid lip service to the *Eisen IV* rule that the plaintiff must initially bear the cost of notice to the class, the majority simply ignored the plain fact that the effect of its ruling was to vitiate this Court's *Eisen IV* decision.

The majority attempted to distinguish between (i) the costs that plaintiffs are required to bear in providing individualized notice to the class pursuant to Rule 23(c)(2), including the cost of printing the notice and of procuring, stuffing, addressing and posting the envelopes sent to each member of the class and (ii) the cost of obtaining the names and addresses to be affixed to the envelopes so sent, which cost, the majority concluded, must be borne by

the defendant Fund. The majority of the three-judge panel, and the en banc dissenters, were unable to perceive any logical basis for such a distinction, the latter stating:

> "We cannot appreciate how it can be reasonably held that the expense incurred in producing the list of addresses is distinguishable from the expense of preparing and mailing the notice." (App. E, p. 49a.)

The en banc majority interpretation finds no support in Rule 23(c)(2), under which the court is required to direct to class members "the best notice practicable under the circumstances, *including individual notice to all class members who can be identified through reasonable effort.*" (emphasis added) The language of Rule 23(c)(2) does not distinguish between the process of identification and the notification procedure. The plain import, not contradicted by any other provision of Rule 23, is that ascertaining the names and addresses of the class members is an essential and integral part of the process of giving notice to each of those persons.

A substantial majority of the relevant cases have not made the arbitrary distinction created by the en banc majority below and have treated the cost of class member identification as part of the cost of providing notice pursuant to Rule 23(c)(2).[17] In several of these cases, which

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[17] Although the rationale of the respective courts is sometimes unclear, the following decisions treat the cost of class member identification as a cost of notice: *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) (discussed at length *infra*); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 359-60 (E.D. Pa. 1976); *In re Franklin National Bank Securities Litigation*, 73 F.R.D. 25 (E.D.N.Y. 1976) (relying upon the holding of the original panel of the Court of Appeals in this case); *Popkin* v. *Wheelabrator-Frye, Inc.*, CCH Fed. Sec. Law Rep. ¶ 95,411 (S.D.N.Y. 1976); *City of New York* v. *Darling-Delaware, Inc.*, 1976-1 CCH Trade Cases ¶ 60,812 at pp. 68,512, 68,514 (S.D.N.Y. 1976); *In re U. S. Financial Securities Litigation*,

antedate this Court's decision in *Eisen IV*, district courts allocated identification and other notice costs to one or more of the defendants on the basis that the cost of notice was an appropriate area for exercise of the courts' dis-

69 F.R.D. 24, 46-47 (S.D. Cal. 1975); *Hawkins* v. *Holiday Inns, Inc.*, 1975-1 CCH Trade Cases ¶ 60,153 at p. 65,465 (W.D. Tenn. 1975); *B&B Investment Club* v. *Kleinert's, Inc.*, [1973-1974 Transfer Binder] CCH Fed. Sec. Law Rep. ¶ 94,451 at pp. 95,572-73 (E.D. Pa. 1974); *Grad* v. *Memorex Corporation*, 61 F.R.D. 88, 103 (N.D. Cal. 1973); *Herbst* v. *International Telephone & Telegraph Corp.*, 65 F.R.D. 13, 19-21 (D. Conn. 1973), *aff'd*, 495 F.2d 1308 (2d Cir. 1974); *Lamb* v. *United Security Life Co.*, 59 F.R.D. 25, 42-43 (S.D. Iowa 1972); *In re Antibiotic Antitrust Actions*, 333 F.Supp. 278, 290-91 (S.D.N.Y. 1971); *West Virginia* v. *Chas. Pfizer & Co.*, 314 F.Supp. 710, 724-25 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079, 1083 (2d Cir.), *cert. denied, sub nom., Cotter Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 494 (N.D. Ill. 1969); *Berland* v. *Mack*, 48 F.R.D. 121, 131-33 (S.D.N.Y. 1969); *Herbst* v. *Able*, 47 F.R.D. 11, 17-19 (S.D.N.Y. 1969); *Brennan* v. *Midwestern Life Insurance Co.*, 259 F.Supp. 673, 684 (N.D. Ind. 1966).

Four United States District Courts appear to have distinguished between the notification procedure under Rule 23(c)(2) and the process of identifying the persons to whom such notice must be given. Three such cases were decided in the Eastern District of Pennsylvania. *Chevalier* v. *Baird Savings Ass'n.*, 72 F.R.D. 140, 148 (E.D. Pa. 1976) (citing the decision of the District Court in this case); *In re Penn Central Securities Litigation*, 416 F.Supp. 907, 921 (E.D. Pa. 1976), *rev'd*, No. 76-2139 (3d Cir. August 5, 1977); *Richardson* v. *Hamilton International Corp.*, 62 F.R.D. 413, 423 (E.D. Pa. 1974). There is a clear conflict of authority in the Eastern District of Pennsylvania on this issue. *In re Sugar Industry Antitrust Litigation, supra*, at 359-60 (E.D. Pa. 1976), and *B&B Investment Club* v. *Kleinert's Inc., supra*, at 95,572-73 (E.D. Pa. 1974), hold that the cost of identification is part of the cost of notice which must be borne by the class representatives. The fourth case was decided by the United States District Court for the District of Columbia and is based solely on the erroneous interpretation that *Eisen IV* implicitly distinguishes between identification and notice. *Foster* v. *Maryland State Savings & Loan Ass'n.*, 1974-2 CCH Trade Cases ¶ 75,277 (D.D.C. 1974).

None of the above cases is cited in the en banc majority opinion. However, the conflict between these cases and those holding that identification is a component of the notice procedure and the resulting confusion of courts and litigants underscore the need for review and resolution by this Court.

cretion. *See, e.g., Berland* v. *Mack*, 48 F.R.D. 121, 131-33 (S.D.N.Y. 1969). The *Eisen IV* decision terminated that discretion, holding that notice costs must be borne by the plaintiff in the usual case. But these early cases remain significant in that they demonstrate a consistent judicial recognition, both before and after this Court's decision, that the identification of class members is an element of the Rule 23(c)(2) notice procedure.

In the course of dealing with class member identification under the Rule 23(c)(2) notice procedure, some courts have ordered the defendant to provide the plaintiff with business records and other raw materials, or access thereto, from which the plaintiff has been required to extract the class members' names and addresses. *E.g., City of New York* v. *Darling-Delaware, Inc.*, 1976-1 CCH Trade Cases ¶ 60,812 at pp. 68,512, 68,514 (S.D.N.Y. 1976); *Herbst* v. *International Telephone & Telegraph Corp.*, 65 F.R.D. 13, 19-21 (D. Conn. 1973). This is entirely consistent with the view that class member identification is part of the Rule 23(c)(2) notice procedure and resort to the discovery rules for authority to enter such orders is unnecessary. Under Rule 23(d), the district court can direct a defendant to furnish relevant raw materials to the plaintiff.[18] *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977) (discussed at length *infra*). Here, the computer tapes and records from which the class

[18] Rule 23(d) grants broad powers to a court in managing a class action, including the power to make appropriate orders "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action. . . ."

Moreover, this Court has long recognized the salutary "power inherent in every court to control the disposition of the causes on its docket. . . ." *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936).

members can be identified are fully available to the plaintiffs, and the defendants have never sought to deny plaintiffs access thereto. However, consistent with this Court's *Eisen IV* decision, the Fund should not be compelled at its own expense, and without the possibility of any financial benefit to itself, to refine this material to effect class member identification, thereby forcing it to assume the greatest part of plaintiffs' burden of providing notice to the class.[19]

The cost of class member identification, like other notice costs, should be borne initially by the four plaintiffs as part of the ordinary burden of financing their own suit. Here, as in most cases, the names and addresses of the class members are in no way related to any substantive or procedural matter at issue, nor to the proof of any substantive or procedural allegation or claim contained in the complaints, nor to any denial, claim or defense contained in the answers.[20] The information is useful only in accommodating the plaintiffs' desire to comply with the Rule 23 (c)(2) notice provisions requisite to commencing this action in the form of a class suit against the defendants. The mere pleading of allegations sufficient to state a valid class interest, which have nothing whatsoever to do with the merits of plaintiffs' claims of wrongdoing, should not effectively transfer to the defendants, and impose upon

[19] In none of the cases decided after *Eisen IV*, cited in the first paragraph of note 17, *supra*, does it appear that the defendant was required to incur any significant unreimbursed expense in assisting the plaintiff to identify the class. In *Hawkins* v. *Holiday Inns, Inc.*, *supra*, note 17, defendant was required to provide the plaintiff with a list of the names and addresses of the 1,000 member class. However, the class as there defined essentially consisted of all the defendant's current franchisees, whose names and addresses were apparently set forth in an existing list.

[20] Therefore, as discussed *infra* at pp. 25-27, the names and addresses are not a proper subject of discovery.

them, the financial obligations attending the commencement of plaintiffs' suit.

In *Eisen IV*, this Court recognized the serious due process infirmity inherent in ordering the defendants to pay the plaintiff's costs, the payment of which was a condition precedent to institution and maintenance of the action. In this regard, this Court found no justification for distinguishing between class actions and other forms of adversary proceedings. In the instant case, there is no justification for drastically altering the holding by means of a fancied distinction between the cost of class member identification and other costs solely attributable to instituting a class suit, such as class notice or service of process.

The opinion of the en banc majority is based upon and, if allowed to stand, will perpetuate both of the arbitrary and constitutionally impermissible distinctions referred to above. In so doing, that decision ignores this Court's mandate and "contravenes [Rule 23] by allowing a representative to secure the benefits of a class action without first satisfying the requirements for it." *Eisen IV*, 417 U.S. at 748.

B. The Court Below Resorted to Procedures Extraneous to Rule 23 to Satisfy Rule 23 Requirements and Thereby Misinterpreted and Misapplied This Court's Holding in *Eisen IV* and Improperly Circumvented the Provisions of Rule 23.

In *Eisen IV*, 417 U.S. at 178-79, this Court held:

> "*In the absence of any support under Rule 23* petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class . . . as part of the ordinary burden of financing his own suit." (emphasis added)

Notwithstanding this clear language, the en banc majority erroneously concluded that the cost of class identification (or presumably any other cost of providing notice) can and should be allocated to the defendant if such allocation, although lacking support in Rule 23, has a basis *elsewhere* in the Federal Rules of Civil Procedure. Claiming to find such a basis in Rule 34, one of the discovery rules, the en banc majority considered that it was free under *Eisen IV* to excise class member identification from the notice procedure.[21]

It is submitted that the majority did not reasonably or correctly interpret this Court's holding. In *Eisen IV* this Court expressly rejected an allocation of notice costs by the district court based upon procedures extraneous to Rule 23, such as a preliminary inquiry into the merits derived from the procedures applicable to preliminary injunctions. In contrast to the en banc majority, the United States Court of Appeals for the Fifth Circuit correctly interpreted this Court's *Eisen IV* holding as follows:

> "As to the propriety of imposing a portion of the costs of notice upon the *Eisen* defendants, [this] Court found that under rule 23, no support whatsoever existed for entering such an order." *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1101 (5th Cir. 1977).[22]

In determining which party should bear the costs of satisfying the Rule 23(c)(2) notice requirements, this Court, in *Eisen IV*, plainly limited the scope of its search

[21] The en banc majority opinion states (App. E, p. 40a.):

"In *Eisen*, the plaintiff's effort to impose the cost of notice upon the defendants failed '[i]n the absence of any support under Rule 23.' Here, Federal Rule of Civil Procedure 34 provides the basis for requiring the [F]und, at its own expense, to provide plaintiffs with discoverable information contained in its computerized records."

[22] See discussion *infra* at pp. 22-24.

to "the language [and] history of Rule 23" and rejected a notice cost allocation based on procedures outside the Rule. *Eisen IV*, 417 U.S. at 749. In this case, the District Court, the en banc majority and the plaintiffs all agree that the identification of class members is necessary *only* to satisfy the Rule 23(c)(2) notice requirements. Nevertheless, the en banc majority held that one of the defendants, the Fund, although devoid of any financial interest in the litigation, must pay the cost of class identification on the basis of the discovery procedures under Rule 34. The en banc majority's circumvention of Rule 23 procedures to satisfy Rule 23 requirements is precisely what was condemned by this Court in *Eisen IV*.

If allowed to stand, the decision of the en banc majority will substantially derogate from the clear rule in *Eisen IV* on the incidence of notice costs. The en banc majority opinion creates uncertainty and enormous further litigation potential for class representatives to posit bases outside Rule 23 for the apportionment of subdivision (c)(2) notice costs—an effect which will be significant in a large number of class actions now pending and likely to be commenced in the future.[23]

The decision below is in conflict with and substantially undercuts this Court's decision in *Eisen IV*; it should be reviewed and reversed by this Court.

[23] *E.g., In re Franklin National Bank Securities Litigation*, 73 F.R.D. 25 (E.D.N.Y. 1976), *appeal pending*, No. 76-7616 (2d Cir., filed December 9, 1976). Plaintiffs attempted unsuccessfully in the district court to impose costs of class identification on non-party broker-dealers on the basis of the discovery rules.

II.

The Decision Below on Class Member Identification Costs Directly Conflicts With the Decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation* and Will Cause Confusion in Numerous Class Actions Unless Resolved by This Court.

A. The Conflict With the Fifth Circuit

In holding that under federal discovery procedures the Fund, a nominal defendant, may be compelled at its own expense to identify absentee class members to assist plaintiffs in meeting their notification obligations under Rule 23(c)(2), the en banc majority opinion directly conflicts with the recent decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) (*"Nissan Motor"*).

In *Nissan Motor*, which was decided shortly before the en banc majority opinion was filed, the plaintiffs, as here, sought an order directing one of the defendants at its expense to search its business records, which were also available to plaintiffs, to compile a list of the names and addresses of the class members to whom individual notice of the action would be sent. Like plaintiffs here, the *Nissan Motor* plaintiffs advised the court that they would not search the defendants' records nor would they bear the cost of the defendants' search.

The Fifth Circuit unequivocally rejected the argument which the en banc majority here accepted, holding:

> "The time and expense of gathering [class members'] names and addresses is a necessary predicate to providing each with notice of the action's pendency without which the action may not proceed. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 179, 94 S. Ct. at 2153. Viewed in this context, it becomes strikingly clear that *rather than being controlled by the federal civil discovery rules, identification of absentee class members' names and addresses is part and parcel of rule 23(c)(2)'s mandate that the class members receive 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'"* (emphasis added) 552 F.2d at 1102.

Consistent with this Court's *Eisen IV* holding on the incidence of notice costs, the Fifth Circuit further held that the plaintiffs were required at their own expense to compile a list of the class members' names and addresses from defendants' records,[24] stating:

> "Upon commencing a class action, the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members as well as paying the costs of their individual notice." *Id.* at 1102.

B. The Impact on Other Cases

If the expense of class identification, which is often substantial, is deemed to be a discovery cost allocable to

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[24] The Fifth Circuit declined to rule on whether *Eisen IV* compels this result in all cases where a "truly adversary" relation exists between the parties. It also refused to adopt the "rule of reason" approach, turning on which party would have the easier task in gathering the class information, which it discerned in the decisions of other courts. It was unnecessary to decide these issues, stated the Fifth Circuit, because under either approach the plaintiffs would be required to furnish at their own expense the necessary names and addresses. The same result would obtain in this case under the *Nissan Motor* holding, since the records from which the instant class members can be identified are also available to plaintiffs here and may be examined as readily and as effectively by the plaintiffs as by the defendants.

the responding party, as the en banc majority decided below, the rule that the plaintiff must bear the ordinary burden of financing his own suit is emasculated. Not only will defendants be required to pay for Rule 23(b)(3) class suits against them, but persons who are not parties to the action and have no financial interest in its outcome, a status not unlike the Fund's, will also be called upon to subsidize the cost of lawsuits commenced by would-be class representatives. Representative plaintiffs have not been reluctant to proceed under the federal discovery rules in an effort to require non-parties at their own expense to search records in their possession containing class members' names and addresses. In the Second Circuit alone, during a one-year period, at least four such discovery orders were sought. *In re Franklin National Bank Securities Litigation*, 73 F.R.D. 25 (E.D.N.Y. 1976) (order denied on basis of decision of the three-judge panel of the Court of Appeals herein), *appeal pending*, No. 76-7616 (2d Cir., filed December 9, 1976); *Jahre* v. *Rait*, 76 Civ. 1305 (E.D.N.Y. July 16, 1976) (prior *ex parte* order vacated); *Weiss* v. *Drew National Corp.*, 75 Civ. 4816 (S.D. N.Y. July 15, 1976) (order denied on basis of decision of original panel of Court of Appeals herein); *Frankenstein* v. *McCrory*, 74 Civ. 727 (S.D.N.Y. November 14, 1975) (order directing identification modified to provide for reimbursement). Undoubtedly, there were similar cases in other circuits. *See, e.g., In re Penn Central Securities Litigation*, 416 F.Supp. 907, 921 (E.D. Pa. 1976), *rev'd*, No. 76-2139 (3d Cir. August 5, 1977).

The majority decision of the Court below is in conflict with the decision of the Fifth Circuit, and involves an important question of federal law which should be settled by this Court.

III.

The Decision Below Is Predicated on an Interpretation of the Scope of Discovery Contrary to the Standards Set by Rule 26(b)(1), Misinterprets and Misapplies the Provisions of Rules 33(c) and 34 and Sanctions an Imposition of Costs on Defendants Without Factual or Legal Justification.

The decision below was reached as if the question of identification of class members and the costs thereof arose in discovery proceedings, when in fact it arose in connection with plaintiffs' motion for class determination under Rule 23. Even if the discovery rules could be considered under a class determination motion, they afford no basis for the en banc majority decision.

A. The Decision Below Contravenes Rule 26(b)(1) by Authorizing Discovery of Information That is Wholly Irrelevant to the Subject Matter of This Action.

Rule 26(b)(1) limits the scope of all discovery, whether sought pursuant to Rule 33, Rule 34 or any other federal discovery provision. 4 Moore's Federal Practice ¶26.56[1] at p. 26-115 (2d ed. 1976). Subdivision (b)(1) states: "[p]arties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter involved* in the pending action. . . ." (emphasis added) Professing to be guided by this standard, the en banc majority held that "the names and addresses of the members of the class [are] indeed within the broad scope of permissible discovery established by our Federal Rules." [25] (App. E, p. 40a.) The majority reached this erroneous conclusion in spite of the fact that plaintiffs

[25] This rationale appears to have its origins solely in the en banc majority opinion. The opinion and order of the District Court below do not mention the federal discovery rules; that Court seems to have perceived the issue as one governed by Rule 23. (App. A, pp. 2a, 7a.)

seek the names and addresses solely for the purpose of class notification under Rule 23(c)(2), which purpose bears no relation whatsoever to the trial of any existing or anticipated substantive issue in this case, the jurisdiction of the court, or the requirements for maintenance of a class suit under subdivisions (a) and (b) of Rule 23.[26]

The en banc majority tried to establish that the information sought by plaintiffs is relevant to the "subject matter involved" in this action, reasoning incorrectly as follows: (i) by mandating individualized notice to class members, "*Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. . . ." and (ii) "[a] list of the names and addresses of the class members would of course be essential to the resolution of that issue." (App. E, p. 40a.)

This is specious reasoning. The majority has based its rationale on a manufactured issue which has never been and is not now in this case, namely, "whether the [notice required by Rule 23(c)(2)] has properly been sent." In fact, plaintiffs here seek the names and addresses to satisfy the *mechanics* of Rule 23(c)(2) and not to obtain information relevant to any question of whether or not proper notification has been given. Plainly, this has nothing whatever to do with the subject matter involved in this action.

Moreover, if this action proceeds as a class action, proper notification will not be an issue in this case, since all of the members of the class can be identified and notice can be mailed to each member. Further, it is difficult to hypothesize the circumstances under which the issue of proper

[26] The District Court determined that all such requirements have been satisfied in this case, including "numerousness" (which pertains to the number and not the identities of the class members), "class definition" (which pertains to the specificity with which the class is defined), "common questions", "typicality", "adequacy of representation", "manageability" and "predomination". These determinations of the District Court are not disputed here.

notification could be raised by the named plaintiffs. As stated by the en banc dissent:

> "Should any issue arise, as to 'proper notification', e.g., was the list complete, was the notice appropriate, was the postage adequate, presumably it would be raised by a putative member of the class but not *in limine* by the plaintiffs who are required to notify and pay the costs of notification under *Eisen IV*." (App. E, p. 52a.)

The decision of the en banc majority permits discovery of information which is not relevant to the "subject matter involved" in this action but to the mechanical requirements of Rule 23(c)(2). In support of its decision, the en banc majority interjects an issue which is in reality utterly extrinsic to this case. The en banc majority here extends the scope of discovery beyond the perimeters of subject matter relevance established by Rule 26(b)(1) so that it seemingly encompasses any information that is useful to the plaintiff in instituting or prosecuting the suit. This construction is not limited in its applicability to the Rule 23(c)(2) notification procedure or to Rule 23(b)(3) class actions but is an untoward precedent in all civil actions to which Rule 26 applies.

B. The Decision Below Misinterprets and Misapplies the Provisions of Rules 33(c) and 34 on a Dispositive Issue in This Case.

For the reasons heretofore stated, the process of identifying the names and addresses of the class members must be treated as an integral part of the Rule 23(c)(2) notice procedure and not within the scope of discovery set by Rule 26(b)(1). However, if the federal discovery rules are deemed to apply, consistent therewith the Fund nevertheless cannot be compelled to bear the substantial expense of creating special computer programs to extract from its computerized business records, which are fully available

to the plaintiffs, the names and addresses of the prospective class members. Rule 33(c) is expressly designed to protect parties, such as the Fund, who have records from which the desired information can be compiled. It permits a party to respond to burdensome interrogatories by affording the party seeking discovery "reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries." [27]

The en banc majority held that the Fund is not entitled to the protection of Rule 33(c) because (i) the class members' names and addresses are contained in computer tapes and (ii) the production of computerized information is governed exclusively by Rule 34, which provides for the production, inspection and copying of "documents and things," including "data compilations" [28] from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. . . ."

In so holding, the en banc majority was cautious to note: "We intimate no view as to what the result in the instant case would be if Rule 33(c) were deemed applicable." (App. E, p. 42a n.1.) Contrary to the decision reached by the majority, if the federal discovery rules were applicable, Rule 33(c), not Rule 34, should govern the process of as-

[27] Rule 33(c) recognizes the long-standing rule applied by courts in cases involving computerized information and other records. *E.g., Adams* v. *Dan River Mills, Inc.*, 54 F.R.D. 220 (W.D. Va. 1972); *Tytel* v. *Richardson-Merrell, Inc.*, 37 F.R.D. 351 (S.D.N.Y. 1965); *Konczakowski* v. *Paramount Pictures, Inc.*, 20 F.R.D. 588, 593 (S.D.N.Y. 1957).

[28] The Advisory Committee Note (48 F.R.D. 487, 527) to the addition of the category "data compilation" to Rule 34 indicates that the amendment was merely intended to clarify the scope of the Rule, not to change it. *United States* v. *Davey*, 543 F.2d 996, 999 (2d Cir. 1976). This would indicate that Rule 34 is intended to have no special or exclusive application to computer data. Rule 33(c) also speaks of "compilations."

certaining the names and addresses of the members of the class.

The class members' names and addresses are not subject to Rule 34, which "applies only to documents and things that are already in existence. . . ." [29] 4A Moore's Federal Practice ¶ 34.05[1] at p. 34-32 & n.4 (2d ed. 1975). In the case of existing "electronic data compilations," the Advisory Committee's Note states that the "respondent may be required to use his devices to translate the data into usable form [often] a print-out of computer data." Advisory Committee Note, 48 F.R.D. 487, 527 (1970). A print-out of existing computer data can generally be made at nominal expense. However, the identities of the class members here are not an existing data compilation; a compilation of such information can be created only at substantial expense through the design and implementation of new computer programs to scan and refine the existing data. The clear distinction between the scope of Rule 34 and the production of information sought by plaintiffs here, was recognized in the majority opinion of the original Court of Appeals panel.[30]

The computerized business records, from which a list of the names and addresses can be compiled, are fully

[29] As to the scope of examination, Rule 34 is to be construed in pari materia with Rule 45, which provides for the subpoena duces tecum. 4A Moore's Federal Practice ¶ 34.02[1] at pp. 34-12—34-13 (2d ed. 1975).

[30] *"The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned.* If 'sophisticated electronic manipulation and analysis' become necessary, *'the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets.'* 8 C. Wright and A. Miller, Federal Practice & Procedure §2218 at 659 (1970)." (emphasis added) (App. C, p. 23a n.7.)

available to plaintiffs, who can examine the records as easily and as effectively as can the defendants. Plaintiffs simply seek to have this research and compilation of data performed for them. These are precisely the circumstances under which Rule 33(c) is intended to afford protection to the responding party; the fact that here the records are computerized does not preclude the application of the Rule.

For example, in *Laufman* v. *Oakley Building and Loan Company*, 72 F.R.D. 116, 121 (S.D. Ohio 1976), the defendants were given the option provided by Rule 33(c) in response to interrogatories addressed to material contained in computer banks. This is consonant with the treatment of computerized business records in other contexts. Computerized information has been held to constitute "business records" under the Business Records Act, 28 U.S.C. §1732. *United States* v. *Fendley*, 522 F.2d 181 (5th Cir. 1975); *United States* v. *Russo*, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974). Under Fed. Rules Evid. Rule 803(6), 28 U.S.C., business records include "data compilations." The Advisory Committee Note to the business records rule states that the term "data compilations" is borrowed from Rule 34(a) and includes electronic computer storage.

There is no reason to differentiate between business records stored in a computer and other basic types of records. Discovery requests relating to computer records should be treated in a manner consistent with similar requests for other types of information. Indeed, the potential for abuse of the kind which Rule 33(c) was intended to ameliorate is greater in the case of computer records than in other settings. Where the information was not recorded in computer tapes in the form later desired by the party seeking discovery, that party should bear the

burden, under Rule 33(c), of developing the special programs for the analysis and reorganization of the existing computer tapes. The procrustean decision of the en banc majority, denying application of Rule 33(c) in all cases of computerized business records, imposes an unfair burden on the responding party in this case, and, because on this point the majority opinion is absolute, ensures a perpetuation and proliferation of this inequity in numerous cases involving computerized business operations that will be decided in the district courts.[31]

C. Even if the Discovery Rules Were Applicable, the Factors Relied on by the Court Below Do Not Justify the Imposition of the Substantial Costs of Class Identification on the Financially Disinterested Fund.

Holding that the District Court committed no abuse of discretion in imposing class identification costs on the Fund, the en banc majority stressed two considerations: (i) the expense thus imposed is not unreasonable in light of "the nature of the information sought" and the "vast and complex" business operations of the Fund, and (ii) the expense "was occasioned by the [district] court's agreement with defendant that the [F]und would have been harmed by the proposed class redefinition." (App. E, pp. 44a, 46a.)

As pointed out by the en banc dissent, any cost allocation turning upon the first consideration in a class action context would necessarily be inflexible, since such actions are invariably brought against those whose financial resources are vast in comparison with those of the plaintiffs.

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[31] Thus, the en banc dissent wrote:

"To require corporate defendants to so arrange their computer programming as to anticipate the endless variety of prospective classes which might someday bring class actions is, of course, unrealistic and not required by any law we know of until this decision which hopefully will be short lived." (App. E, p. 54a.)

(App. E, p. 53a.) Moreover, this consideration was expressly rejected in *Eisen IV*, 417 U.S. at 1176, where this Court stated: "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs."

The second consideration relied on by the en banc majority erroneously assumes a logical or equitable nexus between (i) the defendants' opposition to a redefinition of the class posed by plaintiffs and rejected by the District Court as arbitrary and improper and (ii) the defendants' obligation to identify the members of the class as originally defined for the purpose of notifying such persons. If, as found by the District Court, the proposed redefinition was arbitrary and improper, then defendants were justified in opposing it, and, by so doing, should not be subjected to a liability that they would not otherwise be required to bear. The en banc dissent correctly states: "If this is to be the law the opportunities for abuse become obvious." (App. E, p. 54a.) The issues of proper class definition and class member notification are discrete; each should be dealt with separately, on its own terms. Moreover, the District Court's ruling that plaintiffs could not exclude from their class those persons who had sold all of their shares and ceased to be shareholders of the Fund does not affect the cost of identifying the class, since, had such persons been excluded, it still would have been necessary to devise new computer programs to ascertain and assemble from the Fund's list of current shareholders the names and addresses of those who purchased shares during the class period.

In addition to vitiating this Court's decision in *Eisen IV*, the decision below incorrectly resolves important questions of federal law concerning the scope and purposes of the federal discovery procedures and the problems of accommodating these procedures to the development of computer technology. It should be reviewed and reversed by this Court.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

DATED: New York, New York
August 31, 1977

Respectfully submitted,

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APPENDIX

APPENDIX A

District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 1242 (T.P.G.)

IRVING SANDERS,

Plaintiff,

v.

LEON LEVY, et al.,

Defendants.

EGON TAUSSIG,

Plaintiff,

v.

SIDNEY M. ROBBINS, et al.,

Defendants.

MICHAEL SHAEV and RITA SHAEV,

Plaintiffs,

v.

ERIC HAUSER, et al.,

Defendants.

GRIESA, *J*.

Plaintiffs have moved for class action treatment of a part of these consolidated cases, which consist of both

class and derivative claims. Certain problems have been raised, mainly as to the definition of the class and as to who is to bear certain expenses connected with the giving of notice.

I have concluded that the class claims are properly brought under Fed. R. Civ. P. 23 (b)(3), and that the class shall consist of all persons who purchased shares of defendant Oppenheimer Fund, Inc. ("the Fund") between March 15, 1968 and April 24, 1970. The Fund is to be responsible for whatever work and expense is involved in providing the list of class members to plaintiffs. Thereafter plaintiffs will be responsible for mailing the necessary notices, and will bear the necessary costs.

I.

The three captioned actions were commenced March 26, 1969, May 12, 1969 and June 18, 1969, respectively. They were consolidated on December 17, 1969.

Plaintiffs own shares in defendant Fund, which is an open-ended investment Fund registered under the Investment Company Act of 1940 (15 U.S.C. §§80a et seq.). Shares are sold by the Fund or its agents to the public at a price which represents the net asset value of the shares plus a sales charge. The Fund has about 174,000 shareholders who hold over 67 million shares.[1]

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[1] Technically, the Fund shares are held in two forms. There are about 86,000 shareholders who own their shares of the Fund directly. The other 88,000 are held by Oppenheimer Systematic Capital Accumulation Program ("OSCAP"), which holds shares of the Fund as "custodian". The 88,000 participants in the OSCAP plan are termed "planholders" and own undivided interests in the total number of shares held by OSCAP.

For the purposes of this opinion, I am considering the OSCAP planholders as shareholders of the Fund. In connection with the class action motion, the parties have proceeded on this basis.

Defendant Oppenheimer Management Corporation ("the Manager") acts as manager of the Fund's investment portfolio. Pursuant to an Investment Advisory Agreement, the Manager receives a fixed fee calculated as a percentage of the Fund's net asset value. In addition to the fixed fee the Manager also receives a fee in each year that the Fund betters its market rating over the preceding year.

Defendant Oppenheimer & Co., a brokerage firm, is a partnership that owns about 82% of the Manager's stock. This 82% includes 100% of the voting stock. The individual defendants are all directors or officers of the Fund or of the Manager, or partners in Oppenheimer & Co. Some of the individuals are principals in all three organizations.

Plaintiffs allege that defendants violated the federal securities laws by failing to disclose material information to investors. Plaintiffs point particularly to the Fund prospectuses of March 15, 1968, September 3, 1968 and April 25, 1969. Specifically plaintiffs claim that defendants failed to state that the Fund would purchase "restricted" securities and failed to describe the risks involved in such purchases. They further claim that the Fund overvalued the restricted securities it owned, and failed to disclose material information in regard to the valuation of restricted securities—namely the method used to value them. As a result, according to plaintiffs, the total net assets of the Fund were overstated causing a concomitant overvaluation of Fund shares being sold to the public. Plaintiffs allege also that by virtue of the fee arrangement with the Manager the overvaluation of Fund net assets caused the Fund to pay excessive fees to the Manager.

Plaintiffs sue to recover damages on behalf of shareholders who paid excessive prices for their Fund stock;

and derivately on behalf of the Fund to recover the allegedly excessive fees paid to Manager. Defendants deny the material allegations made in the complaints.

III.

The requirements of a class action under Rule 23 are clearly met in the present case. The class will number about 121,000 members, so that the numerosity requirement is met. There are questions of law and fact common to the class within the meaning of Rule 23(a)(2), and indeed it is clear that the questions of law and fact common to the members of the class predominate over any question affecting only individual members, within the meaning of Rule 23(b)(3). The core of the class claims relates to the questions about whether or not material information about the valuation of restricted securities was withheld from investors in the Fund. There are also the questions relating to the responsibility of the various defendants in the event that there was a withholding of material information. All of these matters relate to issues common to the class. It is by now established that in such a situation a class action is appropriate, despite the fact that there may be individual issues relating to causation and damages.

Defendants make an argument that the class claims are unmanageable because the average recovery per class member is estimated to be between $2.00 and $24.00. Plaintiffs contend that these averages are misleading and that numerous persons in the class would recover substantial amounts. On the basis of the information presently available, I am of the opinion that it would be inappropriate to declare these class claims unmanageable. At least as far

as the present record shows, these class claims partake of no more difficulty than is attendant upon the claims in numerous class actions which the federal courts have entertained. If, at a later point in the action, a clearer demonstration of unmanageability is made, the court can deal with this problem. Also, no question has been raised about the adequacy of the named plaintiffs and their counsel to represent the class.

I therefore conclude that this is a proper class action under Rule 23(b)(3).

IV.

Originally plaintiffs sought to represent all persons who purchased Fund shares during the relevant period—both past and present owners. However, it then appeared that the cost of compiling this list of persons from defendants' records would, according to defendants' estimate, be approximately $16,000. Plaintiffs then suggested a modification intended to eliminate this expense. The proposal is to break out of the class those Fund shareholders who have sold their shares (about 18,000 persons), and to include only those shareholders who still own their shares (about 103,000 persons). Defendants oppose the suggested cut, presumably because it would limit the res judicata effect of this action.

Without discussing the mechanical questions of how plaintiffs' proposal would eliminate the expense, I can simply say that in my view, plaintiffs' proposal would involve an arbitrary reduction in the class. If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those share-

holders who have sold out just as much as those who happened to have retained their shares.

Moreover, with respect to the cost of culling out the list of class members, I am ruling that this is the responsibility of defendants. Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense.

V.

Plaintiffs propose to include in the class all persons who purchased Fund shares from March 15, 1968 (the date of the first allegedly false prospectus referred to) to April 24, 1970 (the date of the prospectus in which, according to plaintiffs, defendant first fully described the method used by the Fund in valuing restricted securities in the Fund's portfolio).

Defendants have no objection to the March 15, 1968 starting date, but contend that the class period should be cut off at April 25, 1969, the date of a prospectus that defendants claim disclosed to the public the pendency of these law suits and the allegations of non-disclosure made by plaintiffs here.

I conclude there is a triable claim that the disclosure in the April 25, 1969 prospectus was not adequate. The 1969 prospectus does indeed inform the reader of the pendency of this and other law suits. It does state that the suits call the valuation of restricted securities into question. It further states that in the opinion of management the suits are "meritless." On valuation of restricted securities in particular the 1969 prospectus states that restricted securities are valued at "fair value as determined in good faith

by the Board of Directors." However, nowhere in the April 25, 1969 prospectus is there an explicit statement of how the Board of Directors arrives at a valuation for the shares.

The April 24, 1970 prospectus is substantially different. In addition to the almost identical references to the present litigation and to the fact that the Board of Directors values the restricted securities, there is an entire page which specifically sets forth the method used in valuing these securities.

I therefore conclude that the class may properly include persons who bought fund shares through April 24, 1970.

This finding does not, of course, determine the merits of plaintiffs' allegations. The materiality of the information plaintiffs claim should have been disclosed as well as the market effect of its disclosure or non-disclosure are questions to be litigated.

VI.

Plaintiffs are seeking to minimize their expenses in connection with giving notice to the members of the class. As indicated earlier, their proposal is to limit the class to Fund shareholders who bought in the relevant period and who still own their shares, *excluding* shareholders who have sold their shares.

Plaintiffs further propose that the giving of notice should be accomplished by having the Fund insert the notice in a regular mailing to its present shareholders.

Defendants raise two objections to these proposals. One objection has already been described and dealt with—that the proposal would cut out of the class approximately 18,000 persons who logically belong in the class. Earlier

in this opinion, I stated my ruling in favor of defendants on this point.

The second objection of defendants is that the insertion of the notice in a regular mailing to the current Fund shareholders would result in the notice being sent to numbers of shareholders who are not members of the class. My solution to this problem starts with my earlier ruling that it is the responsibility of defendants to cull out from their records a list of all class members and provide this list to plaintiffs. Plaintiffs will then have the responsibility to prepare the necessary notice and mail it at their expense.

The parties should settle an order on this opinion, and should submit a form of notice to be given to the members of the class.

Dated: New York, New York
May 15, 1975

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

APPENDIX B

District Court Memorandum Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 1242

IRVING SANDERS,

Plaintiff,

v.

LEON LEVY, et al.,

Defendants.

EGON TAUSSIG,

Plaintiff,

v.

SIDNEY M. ROBBINS, et al.,

Defendants.

MICHAEL SHAEV and RITA SHAEV,

Plaintiffs,

v.

ERIC HAUSER, et al.,

Defendants.

GRIESA, *J.*

Motions for reargument of my May 15, 1975 opinion have been made by plaintiffs and by various defendants. All such motions are denied, except as follows:

Appendix B

(1) The starting date for the period for the class claims should be March 28, 1968 instead of March 15, 1968.

(2) The cost of culling out the list of class members shall be borne by defendant Oppenheimer Fund, Inc., without prejudice to the right of this defendant, at the conclusion of the action, to make whatever claim it would be legally entitled to make regarding reimbursement by another party.

(3) As to the mailing of notices, plaintiffs are to have the option of (a) sending them out in their own mailing; or (b) including them in a regular mailing of defendant Oppenheimer Fund, Inc., provided that the notices are sent only to class members and that plaintiffs pay in full the Fund's extra costs of mailing, including the costs of segregating the envelopes going to the class members from the envelopes going to other Fund shareholders.

So ordered.

Dated: New York, New York
September 30, 1975

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

APPENDIX C

Court of Appeals Three-Judge Panel Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 743, 744, 745—September Term, 1975.

(Argued May 5, 1976 Decided June 30, 1976.)

Docket Nos. 75-7608, 75-7610, 75-7611

IRVING SANDERS,

Plaintiff-Appellee,

—against—

LEON LEVY, et al.,

Defendants-Appellants.

EGON TAUSSIG,

Plaintiff-Appellee,

—against—

SIDNEY M. ROBBINS, et al.,

Defendants-Appellants.

MICHAEL SHAEV and RITA SHAEV,

Plaintiffs-Appellees,

—against—

ERIC HAUSER, et al.,

Defendants-Appellants.

Appendix C

Before:

HAYS and MULLIGAN, *Circuit Judges,* and
PALMIERI, *District Judge.**

Appeal from an order of the Hon. Thomas F. Griesa, *Judge,* United States District Court for the Southern District of New York, holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing that the defendant mutual investment fund bear substantial costs of extracting the names and addresses of the class members from computer tapes.

Affirmed as to class action designation. Reversed as to allocation of identification costs.

GERALD GORDON, New York, New York (Weisman, Celler, Spett, Modlin & Wertheimer, New York, New York, Milton C. Weisman, of Counsel), *for Defendant-Appellant Oppenheimer Fund, Inc.*

LEON H. TYKULSKER, New York, New York (Guggenheimer & Untermyer, New York, New York, Richard P. Ackerman, of Counsel), *for Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash.*

JOHN F. DAVIDSON, New York, New York (Thacher, Proffitt & Wood, New York, New York, Daniel E. Kirsch, of Counsel), *for Defendants-Appellants Edmund T. Delaney and Emanuel Celler.*

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* Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

Appendix C

DONALD N. RUBY New York, New York (Wolf Popper Ross Wolf & Jones, New York, New York, Robert Kornreich, of Counsel), *for Plaintiffs-Appellees.*

PALMIERI, *D.J.:*

Plaintiffs-appellees (plaintiffs) seek to maintain this action on behalf of certain present and former stockholders of Oppenheimer Fund, Inc. (the Fund), an investment company registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* This is an appeal under 28 U.S.C. § 1291 from an interlocutory order holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing the defendant-appellant (defendant) Fund to bear substantial costs in identifying the names and addresses of the class members so that plaintiffs can send them the initial notice of the pending action as required by Rule 23(c)(2), Fed. R. Civ. P.

When the motion for class determination was made, there were over 67 million shares of the Fund outstanding held by approximately 173,000 shareholders. Of the approximately 121,000 present or former shareholders who constitute the class designated by the plaintiffs, about 103,000 remain shareholders and 18,000 have sold their shares. The information needed by plaintiffs for the preparation of the notice to the members of the class, particularly the names and addresses of the class members, is contained in magnetic computer tapes kept by the transfer agent of the Fund. The extraction of this information from the tapes would require, in addition to the usual processing, the design of new computer programs. The

cost of accomplishing this task was estimated by the transfer agent to be $16,580 as of October 10, 1973.

On each of the issues presented, identification costs and designation as a manageable class action, we must first decide if the issue is reviewable on appeal and, if so, then determine if the district court's decision should be upheld. Since we find that our treatment of the identification costs matter affects the designation question, we discuss the identification costs matter first.

The Allocation of Identification Costs

The order requiring the Fund to bear the identification costs is appealable because it fits squarely within the collateral order doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). The requirements of that doctrine are essentially twofold: first, the decision appealed from must not be "tentative, informal or incomplete," 337 U.S. at 546, but rather it must conclusively settle a party's claim; second, the decision must involve a collateral matter that can be reviewed apart from the merits of the case but which cannot be effectively reviewed on appeal from the final judgment. In *Eisen* v. *Carlisle & Jacqueline (Eisen IV)*, 417 U.S. 156 (1974), the Supreme Court faced the question whether this court had jurisdiction in *Eisen* v. *Carlisle & Jacquelin (Eisen III)*, 479 F.2d 1005 (2d Cir. 1973) when we reviewed the district court's order imposing notice costs on the defendants. The Supreme Court decided that the order was appealable because it was "'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.'" 417 U.S. at 172, *quoting Cohen, supra*, 337 U.S. at 546-47. *See also, General Motors Corp.*

v. *City of New York*, 501 F.2d 639, 647 (2d Cir. 1974). We find this question of appealability controlled by *Eisen IV*.

We turn next to the merits of the order allocating identification costs. Rule 23(c)(2), Fed. R. Civ. P., provides in relevant part:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Since this is a class action brought under subdivision (b)(3) of the rule, namely, one in which the court below found that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members, and that the class action was superior to other available methods, individual notice of the action must be sent to all class members who can be identified by name and address through a reasonable effort. *Eisen IV*, 417 U.S. at 173-77. The cost of such notice must be borne in the first instance by plaintiff. *Id.*, 417 U.S. at 177-79; *Eisen III*, 479 F.2d 1005, 1009 (2d Cir. 1973); *Eisen II*, 391 F.2d 555, 568 (2d Cir. 1968). The authorities just cited enunciate the views of the Supreme Court and this court that, absent special circumstances, if the plaintiff does not accept this expense, the class action cannot be maintained. In the usual case, defendants may not be compelled to provide financial support for a class action against themselves.

> Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost

of notice as a part of the ordinary burden of financing his own suit.

Eisen IV, 417 U.S. at 178-79.

The possibility that plaintiff may not be required to defray the cost of notice is still an open question in some cases. The Supreme Court declined to foreclose the possibility in "situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit." *Eisen IV, supra,* 417 U.S. at 178. In addition to the derivative suit, we have suggested that there may be other similar cases in which justification might be found for holding that a representative plaintiff is not obligated to defray the cost of notice, citing "a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund." *Eisen III,* 479 F.2d 1005, 1009 n.5 (2d Cir. 1973). The district judge does not appear to have pursued this line of analysis and the plaintiffs have mentioned it only in passing.

Assuming that there may be cases where the imposition of notification costs on the defendant may be justified, we *do* not think this is such a case. The defendant Fund is not a public service monopoly with the responsibilities incumbent upon such an entity, and no finding of liability has yet been entered against it. The Supreme Court in *Eisen IV* did not attempt to elucidate the exceptional case in which a representative plaintiff might be relieved of this burden. Indeed, it did not unequivocally state that there was such a case. It did speak of the shareholder derivative suit but that apparently was by way of analogy since the derivative suit is not a class action, though possibly akin thereto.[1] The Supreme Court also described *Eisen IV* as a case where "the relationship between the parties is truly adversary." 417 U.S. at 178. Possibly this was intended to contrast it with a derivative suit where the corporation, though a nominal defendant, has interests closely aligned with the plaintiff and indeed would be the beneficiary of any recovery. The equities in favor of imposing some costs on the corporation in that situation are obvious. But the Supreme Court more likely had in mind an arms-length relationship unencumbered by fiduciary duties. The relationship between the plaintiffs and the Fund is probably not "truly adversary" in the *Eisen IV* sense. Although the Fund is not in the position of the corporation in a derivative suit,[2] we may assume it had fiduciary duties to the purchasers of its shares. See *Dolgow* v. *Anderson,* 43 F.R.D. 472, 498-99 (E.D.N.Y. 1968). But the relationship between the plaintiffs and the Fund is not non-adversarial in a manner which requires an exception to the *Eisen IV* rule on notification costs, but in a manner that makes it totally improper to impose costs on the Fund: the Fund is not a party to the class action claims.[3] No

[1] See *Developments in the Law, Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 943 (1958); Meyer, *The Social Utility of Class Actions,* 42 BROOKLYN L. REV. 189, 190-91 (1975).

[2] Each of the three consolidated suits contains two counts—one a derivative and one a class action. The order on appeal deals only with the latter, and we are not here concerned with the derivative claims. Furthermore, the Fund would not directly benefit from a recovery by the plaintiffs.

[3] The dissent apparently overlooks the fact that the costs were imposed on the Fund which is not a party to the class action claims. *Eisen IV, supra* at 178, makes an exception to the usual rule that the representative plaintiff must bear the cost of notice "where a fiduciary duty pre-existed between the *plaintiff* and *defendant* . . ." (emphasis added). We may not assume that non-class member shareholders would approve of the Fund underwriting these expenses for the benefit of other shareholders.

recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrong-doing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here. Since the Fund has no direct interest in the outcome of the class action claim, it is too remotely involved to have notification costs imposed upon it.

Furthermore, we do not think these costs could properly be imposed on the other defendants. Even if we assume that these defendants—the directors of the Fund, its manager, and the firm that controlled the manager—had fiduciary duties to the plaintiff shareholders, that would be insufficient in our opinion to warrant imposition of notification costs on them on the facts of this case. Many of the considerations pointed to in justification for shifting the costs, see *Dolgow* v. *Anderson, supra,* 43 F.R.D. at 498-500; *Eisen* v. *Carlisle & Jacquelin,* 52 F.R.D. 253, 264-70 (S.D.N.Y. 1971), have been shown to be inappropriate. The district court may not weigh the merits and cite the strength of a plaintiff's case as justification.[4]

[4] We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

Eisen IV, supra, 417 U.S. at 177. We have stated the matter more broadly:

> But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law.

Eisen III, supra, 479 F.2d at 1015.

The result in *Eisen IV* leaves no doubt that the ability of a defendant to bear the costs and the fact that, if it does not, the suit will have to be discontinued, are to be given little or no weight. The public interest in enabling the adjudication of claims that could not be maintained in any other form and in having remedial statutes enforced is sharply offset by the danger, all too frequently realized, of large settlements paid irrespective of the merits of the claim in order to avoid the disastrous expenses of litigation. *Eisen III, supra,* 479 F.2d at 1019. Even the contention that the defendant has an interest in obtaining the effects of res judicata against all members of the class often rings untrue. If the class action proceeds, the defendant may pay large sums in defending claims that might not otherwise have been brought due to the limited interest of the individual plaintiffs.[5] In sum, we perceive no special circumstances in this case that would warrant shifting the costs of notification from the plaintiffs to any of the defendants. We have suggested before that the vindication of valid class claims not maintainable under Rule 23(b)(3) or otherwise is a matter for Congress. *Eisen III,* 479 F.2d at 1019.

The justification that the district court found for imposing some costs on the defendant Fund was twofold. First, it found the expense was "relatively modest," apparently in relation to the assets of the Fund which exceeded $500,000,000. This is an inappropriate consideration in the determination of the incidence of notice costs, even if the costs force the plaintiffs to discontinue as in *Eisen*

[5] *See* Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 MD. L. REV. 139, 155 (1969). This is true of the instant case where the interests of the class members are said to range from $2.00 to $24.00.

IV. The second reason given was that "it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." This bears some analysis. Plaintiffs defined the class as all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970. Discovery then revealed that this class consisted of approximately 121,000 persons, 103,000 of whom were still Fund shareholders, and that the cost of the required computer operations to extract the names and addresses of the class members from the lists of past and present Fund shareholders would be approximately $16,580. Plaintiffs then sought to redefine the class to exclude the 18,000 persons included in the original class who no longer hold Fund shares, and to send the required notice by inserting it in a regular mailing to all present Fund shareholders. The defendants objected to the exclusion of the 18,000 persons, presumably because it would limit the res judicata effect of the suit. The district court reached the same conclusion but for a different reason, holding that these persons could not be excluded because to do so "would involve an arbitrary reduction in the class." [6] The class as originally defined was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the costs. The two issues are distinct.

The defendants also opposed sending the notice to the 68,000 shareholders who are not class members, expressing concern that such a mailing could lower investor confidence

[6] The court found: "If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares."

and trigger a wave of redemptions. The district court did not pass on the validity of this concern; it merely noted that the concern was obviated by having the defendant cull the non-members from the lists. However, there is evidence in the record to substantiate the concern. Plaintiffs assert that the Fund shareholders have been advised of the nature and pendency of this suit 13 times since 1970 in proxies, prospectuses and annual reports. But we think that notice of that type—usually several paragraphs in a footnote written by management and with a strong denial of merit—would have a far milder impact than a separate communication (though mailed with other papers) composed by the plaintiffs, giving a detailed explanation of the claims and without a denial of merit, particularly when the latter portends the imminent prosecution of a matter which the steady flow of prior notices had indicated was dormant if not defunct. In these circumstances, we think that the defendants concern was legitimate and the district court could not properly condition its abatement on defendants' shouldering of the notice costs. The identification costs cannot be viewed as additional expense necessitated by unreasonable or partisan demands on the part of the defendants.

Plaintiffs attempt to distinguish *Eisen III* and *Eisen IV* by asserting that the cost of identifying the members of a class is not a part of notifying those members. They further suggest that identification costs are akin to the expense borne in discovery which a district judge may in his discretion require a party to bear unless the party can show that it is unreasonable and oppressive, citing, ***inter alia,*** 8 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2218 at 659 (1970), and 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 (2d ed. 1975). However, we are of the

opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes. Moreover, if the rules of discovery were applicable, it appears unlikely that they would require that defendants bear the identification costs here. Rule 33(c), Fed. R. Civ. P., designed to protect parties from burdensome interrogatories, provides:

> (c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Under this rule, a party will not be required to perform burdensome extraction of information from sources that are available to the party seeking discovery. *See* 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 at 33-103 (2d ed. 1975); *Tytel* v. *Richardson-Merrell, Inc.*, 37 F.R.D. 351 (S.D.N.Y. 1965); *Konczakowski* v. *Paramount Pictures, Inc.*, 20 F.R.D. 588 (S.D.N.Y. 1957). If the discoverer should proceed under one of the other rules governing discovery, the respondent could obtain a protective order under Rule 26(c) from "undue burden or expense." Nevertheless, we do not rely on this point since we find the discovery rules inapplicable.[7]

The Class Action Designation

We turn next to the designation of the suit as a class action. The determination of the district court that the action met the requirements of Rule 23(b)(3) was discretionary. It is not appealable under the collateral order doctrine. In seeking to arrive at some standards by which to determine the appealability of such an order, we have developed a three-pronged test as set forth in *Herbst* v. *International Telephone & Telegraph Corp.*, 495 F.2d 1308, 1312 (2d Cir. 1974), and refined in *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974), *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974) and, most re-

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[7] Our dissenting Brother sees Rule 34 as "more specifically designed to govern computerized information." This rule addresses itself to the *production* of data compilations for inspection or copying, not to the sorting or analysis of the data. Although the rule provides that the data compilation may be "translated, if necessary, by the respondent through detection devices into reasonably usable form," the concern appears to focus on putting the data into a form intelligible to the discoverer so he can then study or employ it. As the Advisory Committee Note to the 1970 amendment states,

> "[W]hen the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a *print-out* of computer data."

48 F.R.D. at 527 (emphasis added). The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned. If "sophisticated electronic manipulation and analysis" become necessary, "the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets." 8 C. Wright and A. Miller, Federal Practice & Procedure § 2218 at 659 (1970).

cently, in *Parkinson* v. *April Industries Inc.*, 520 F.2d 650 (2d Cir. 1975). *See also, Handwerger* v. *Ginsberg*, 519 F.2d 1339 (2d Cir. 1975). In *Parkinson*, we recognized the "renewed emphasis on the policies of finality" and indicated that only in "extraordinary circumstances" would exceptions to the final judgment rule be permitted. 520 F.2d at 657-58. Although it may be a close question whether that three-prong test is satisfied here, we do not decide that question. We think we may properly review the class action designation because the order in which it was made is properly before us on another ground. Judge Friendly, in his concurrence in *Parkinson, supra*, 520 F.2d at 660, suggested that this exception should be made even if appeals from the grant or denial of class action designation are allowed only under the certification procedures of 28 U.S.C. § 1292(b). There is sufficient overlap in the factors relevant to both issues to warrant our exercising plenary authority over this appeal. *Eisen IV, supra*, 417 U.S. at 172; *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F.2d 67 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966). *See San Filippo* v. *United Bhd. of Carpenters & Joiners*, 525 F.2d 508 (2d Cir. 1975); *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 648 (2d Cir. 1974); 9 J. Moore, *Moore's Federal Practice* ¶ 110.25[1], at 272-73 (2d ed. 1975).

Turning to the merits of the class action designation we find that the granting of class action status was proper. As Judge Griesa found, the requisite numerousness is present and common questions of law and fact predominate over any questions affecting only the individual members of the class. Moreover, we cannot, at this stage of the litigation, support defendants' claim of unmanageability. They contend that proof of liability and damages "may well involve millions of individual computations," and that the aggregate damages sustained by the class may not be great as plaintiffs claim. Nevertheless, the district

judge is in the best position to make a determination of manageability and has considerable discretion in doing so. Modern computer technology can bring formerly insurmountable tasks within the range of manageability. If, on the other hand, unmanageability should develop or facts should arise which indicate that class treatment is inappropriate, the district judge can reassess the procedures to be employed and can even reconsider the class action designation. *Parkinson* v. *April Industries, Inc., supra*, 520 F.2d at 653; *General Motors Corp.* v. *City of New York, supra*, 501 F.2d at 647; *Green* v. *Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Rule 23(c)(1), Fed. R. Civ. P. Judge Griesa specifically noted that his determination was a provisional one.

Accordingly, we affirm the provisional designation of the suit as a class action but reverse the order imposing on the defendant Fund the costs of extracting from computer tapes the names and addresses of the class members.

HAYS, *Circuit Judge* (dissenting in part):

I concur in the majority's holding that the order below is appealable and the granting of class action status proper. I respectfully dissent, however, from the reversal of the district court order directing defendant Oppenheimer Fund, Inc. ("the Fund") to cull out the names of class members from the Fund's computer tapes at the Fund's expense. The majority's decision, ostensibly predicated on the Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin (Eisen IV)*, 417 U.S. 156 (1974), uncritically treats a discovery issue as notice and indiscriminately applies a rule appropriate to arms-length relationships to the fiduciary relationship between the

parties herein. An elaboration of the particular facts attending this suit is fundamental to understanding the nature of the action and my disagreement with the panel's holding.

Defendant Fund is an open-end diversified investment fund registered under the Investment Company Act of 1940, 15 U.S.C. §§80a-1 *et seq.* Defendant Oppenheimer Management Corporation ("the Manager") manages the Fund's investment portfolio and, pursuant to an Investment Advisory Agreement, receives compensation calculated as a percentage of the Fund's net asset value. Defendant Oppenheimer & Co. ("the Broker") is a brokerage firm owning approximately 82% of the outstanding stock of the Manager and 100% of the voting stock. The individual defendants are all directors of the Fund, some of whom also hold offices or directorships or partnership interests in the Manager and/or Broker. The Manager has the right to act as exclusive distributor and sole principle underwriter of Fund shares. Shares are sold to the public at a price equal to net asset value plus a sales charge.

This consolidated suit involves stockholder derivative and class action claims. The class, as certified by the district court, is composed of all persons who purchased Fund shares between March 28, 1968 and April 24, 1970. The complaint alleges that the defendants violated the federal securities laws by failing to disclose material information to investors. The gravamen of the damage claims is that restricted securities purchased by the Fund were overvalued and, consequently, the net asset value of the Fund was overstated. Overstatement of net asset value, in turn, caused an overvaluation of Fund shares being sold to the public during the relevant period and, because the Fund-Manager fee arrangement was geared

to net asset value, caused the Fund to pay inflated fees to the Manager.

As the majority apparently recognizes, the Supreme Court's *Eisen IV* decision is not dispositive of the issue of the allocation of costs of identification in the context herein. *Eisen IV* construed the *notice* requirements of Rule 23(c)(2), which apply to class actions maintained under Rule 23(b)(3), in the context of a case wherein "the relationship between the parties is truly adversary," *Eisen IV, supra* at 178-79, and held that "[t]he usual rule is that a plaintiff must initially bear the cost of notice to the class." *Id.* at 178. In the instant case, in contrast, we deal not with notice costs—a burden plaintiffs herein willingly assume—but with class member identification costs, and we deal not with the usual rule applicable to truly adversarial relationships, but with a rule as to which the Supreme Court took pains to express no opinion—the rule which governs in "situations where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Id.* Both of these distinctions merit pause before we rush to close yet another door to the class action procedure.

In *Eisen IV* the Supreme Court held that in a Rule 23(b)(3) class action the cost of notice, *i.e.*, the letter, envelope, stuffing, and postage is, in the usual case, the responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV, supra* at 179. The opinion properly construed requires only that the litigation expense of notice be borne by plaintiff. It does not require, and surely the Supreme Court did not intend, that *all* litigation expenses, contrary to established rules and practice, are to be hereinafter the plaintiff's responsibility. When identification is sought information allowing a party to proceed with his suit is at the core of the

request. Thus, in purpose and effect such a request is not different in kind from other requests for information routinely made during discovery. That a suit will be unable to proceed absent identification does not vitiate the validity of characterizing identification as a product ascertainable by discovery and governed by the rules applicable thereto. A contrary view clearly is belied by the common practice of establishing jurisdiction by means of discovery.

Rule 34 governs the production of computerized information, making discoverable, *inter alia*, "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. . . ."[1] As noted by 8 C. Wright and A. Miller, Federal Practice and Procedure §2218 at 659 (1970):

> "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.'" (footnote omitted)

While the authors suggest that courts should be sensitive to the expense involved since the disclosing party may

[1] It is somewhat disingenuous to focus, as the majority does, on Rule 33 which governs interrogatories rather than the Rule more specifically designed to govern computerized information. Since the disclosing party has opted to keep his records on computer tapes, there is good reason to allow the district court the usual discretion as to costs of retrieving information from those tapes lest discovery be obstructed by irretrievably burying information to immunize business activity from later scrutiny.

be obliged "to engage in fairly sophisticated electronic manipulation and analysis," *id.*, expense remains an issue properly resting within the sound discretion of the district judge. Under the facts of this particular case the district judge did not consider the costs of processing the defendant's tapes an "undue burden or expense." It is not our practice to disturb the discretionary judgment of a district court in the realm of discovery absent a showing of abuse, *see, e.g., Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *H.L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories*, 384 F.2d 97 (2d Cir. 1967), and discovery of class members should provide no exception. Imposing the cost of culling out the names of members of the class upon the Fund involved no abuse of discretion. The district court, finding this expense attributable to defendants' objections to plaintiffs' efforts to define a subclass minimizing expenses, *cf. Eisen IV, supra* at 179, n.16, did not commit reversible error in refusing to shift this burden to plaintiffs. Moreover, the order below specifically notes that it is "without prejudice to the right of this defendant [the Fund], at the conclusion of the action, to make whatever claim it would be legally entitled to make regarding reimbursement by another party."

Assuming, *arguendo*, that the majority is correct in failing to distinguish identification from notice, reversal of the district order is neither compelled by *Eisen IV* nor an advisable extension of that case. As we noted in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1009 n.5 (2d Cir. 1973)[2] *("Eisen III")* and the Supreme Court noted in

[2] The footnote, in pertinent part, states:

> "Nor did we decide or intend to say [in *Eisen II*, 391 F.2d 555 (2d Cir. 1968)] that in all cases or under all circumstances

Eisen IV, the usual rule that the representative plaintiff must bear the cost of notice may not apply "where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Eisen IV, supra* at 178. The instant appeal squarely raises the issue, heretofore undecided, of whether notice costs may properly be imposed upon a defendant when the relationship of the parties is truly fiduciary. I would hold that they may.

Unquestionably the relationship between Fund shareholders and the defendants herein is of a fiduciary nature. As one court has observed, the Investment Company Act "impose[s] fiduciary obligations of the highest order upon persons who control investment companies." *Securities and Exchange Commission* v. *Advance Growth Capital Corp.*, 470 F.2d 40, 55 n.21 (7th Cir. 1972). *See,* Investment Company Act of 1940, 15 U.S.C. §80a-35. So too, "[t]he Investment Advisors Act of 1940 . . . reflects a

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plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F.R.D. 69, 107."

congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship. . . .'" *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963), *quoting* 2 Loss, Securities Regulation (2d ed. 1961) at 1412. It is the breach of these fiduciary duties which is at the core of this suit.

When the defendants assumed their positions with the Fund they knew, or clearly should have known, that the law imposes very strict standards upon their conduct. Their relationship to the plaintiff class is one of trust; the entire scheme of our investment company and advisor regulation is predicated upon that trust being respected inviolate. A breach of a fiduciary duty traditionally has been considered a much graver transgression than, for example, breach of a contractual duty. Thus, as the majority notes, the Supreme Court in *Eisen* "refused to foreclose the possibility" of allocating notice costs where there exists a fiduciary duty between the parties and their relationship is not truly adversarial. Absent such a special relationship and without support under Rule 23, the Supreme Court found no justification for deviating from the usual rule that a plaintiff must bear notice costs. In cases involving fiduciaries, however, the usual rules traditionally have been modified to insure that the trust relationship is not abused. The norms appropriate in the context of arms-length bargaining are simply inapposite in the fiduciary context. Thus, the usual rule should not apply to preclude class action when to do so creates a serious potential for insulating fiduciary breaches from redress. I would affirm the district court.

APPENDIX D

Order Granting Rehearing En Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-7608

IRVING SANDERS, et al.,

Plaintiffs-Appellees,

v.

LEON LEVY, et al.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed by counsel for the appellees, a majority of the court has voted to grant reconsideration en banc. The court does not deem oral argument necessary, but directs that additional briefs be filed, as follows:

Appellants' brief:	October 5, 1976
Appellees' brief:	October 19, 1976
Appellants' reply brief.	October 22, 1976

The case will be deemed submitted on October 22, 1976.

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The en banc court will consist of the members of this court in active service together with Judge Hays, a Senior Judge who was a member of the original panel.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

Dated: September 14, 1976

APPENDIX E

Court of Appeals En Banc Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1492, 1493, 1494—September Term, 1976.

(Submitted October 22, 1976 Decided June 22, 1977.)

Docket Nos. 75-7608, 75-7610, 75-7611

IRVING SANDERS,

Plaintiff-Appellee,

—against—

LEON LEVY, *et al.*,

Defendants-Appellants.

EGON TAUSSIG,

Plaintiff-Appellee,

—against—

SIDNEY M. ROBBINS, *et al.*,

Defendants-Appellants.

MICHAEL SHAEV and RITA SHAEV,

Plaintiffs-Appellees,

—against—

ERIC HAUSER, *et al.*,

Defendants-Appellants.

Appendix E

Before:

KAUFMAN, *Chief Judge,* and
HAYS, FEINBERG, MANSFIELD, MULLIGAN, OAKES, TIMBERS, GURFEIN, VAN GRAAFEILAND, and MESKILL, *Circuit Judges.*

On rehearing en banc

Appeal from an order of the United States District Court for the Southern District of New York, Griesa, *J.*, holding the suit to be maintainable as a class action pursuant to Rule 23 (b) (3), Fed. R. Civ. P., and directing the defendant mutual investment fund to cull names and addresses of class members from its computerized records. On rehearing en banc, the Court of Appeals held that the district court acted within its discretion in ordering defendant mutual fund to extract the names and addresses of class members at its own expense.

Affirmed.

Judges Mulligan, Van Graafeiland and Meskill dissent.

MILTON C. WEISMAN and GERALD GORDON, New York City (Weisman, Celler, Spett, Modlin, Wertheimer & Schlesinger, New York City, on the brief), *for Defendant-Appellant Oppenheimer Fund, Inc.*

LEON H. TYKULSKER and RICHARD P. ACKERMAN, New York City (Guggenheimer & Untermyer, New York City, on the brief), *for Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash.*

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JOHN F. DAVIDSON and DANIEL E. KIRSCH, New York City (Thacher, Proffitt & Wood, New York City, on the brief), *for Defendants-Appellants Edmund T. Delaney and Emanuel Celler.*

DONALD N. RUBY, ROBERT KORNREICH and MARIAN R. PROBST, New York City (Wolf, Popper, Ross, Wolf & Jones, New York City, on the brief), *for Plaintiffs-Appellees.*

SAMUEL E. GATES, JOHN C. ELAM, PETER J. HOLME, JR., RICHARD J. MACLAURY, RALPH L. MCAFEE, DON H. REUBEN, CARL J. SCHUCK, MARVIN SCHWARTZ, WILLIAM SIMON and GEORGE A. SPIEGELBERG, New York City, *for amicus curiae American College of Trial Lawyers urging reversal.*

HAYS, *Circuit Judge:*

Upon this rehearing en banc we are confronted with the novel question whether, under the Federal Rules of Civil Procedure, the district court was empowered to order a defendant at its own expense to cull from its computerized records the names and addresses of the members of the class represented by plaintiffs. We hold that the district court was possessed of discretion to require the production of the list which plaintiffs demand in order to meet their obligations under Rule 23(c)(2), *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*Eisen IV*), of providing individualized notice to the members of the class. On the record before us, the district court did not abuse its discretion.

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The defendant Oppenheimer Fund, Inc., which was required by the district court to produce the names and addresses of the members of the class, is an "open-end" investment company registered under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.* Shares of the fund are sold to the public at prices reflecting the current value of the fund's assets plus a service charge; shareholders of the fund are free to liquidate their interests by exchanging their shares for a sum determined to represent their proportionate share of the fund's net assets. The roster of shareholders, who number well over 100,000, is of course constantly changing. It scarcely need be said that the computer plays an integral role in the operations of the fund; indeed, in the absence of computer technology, operations so vast and complex as those of the fund might well be impossible to conduct.

The defendant Oppenheimer Management Corporation is the investment adviser which manages the fund's investment portfolio. All of the voting stock of the investment adviser is owned by the defendant Oppenheimer & Co. Individual defendants are directors of Oppenheimer Fund; some of the individual defendants, in addition to occupying directorships in the fund, are officers, directors, or partners of Oppenheimer & Co. or the Oppenheimer Management Corporation.

The plaintiffs are shareholders of the fund. The essence of their complaint is that defendants overvalued restricted securities purchased by the fund; the overvaluation of the fund's assets is alleged in turn to have caused the inflation of the prices at which plaintiffs purchased shares in the fund and to have caused overpayments to the fund's manager, defendant Oppenheimer Management Corporation, whose fees are computed as a percentage of the net asset value of the fund's portfolio.

Appendix E

In their initial motion for class determination pursuant to Rule 23(c)(1), plaintiffs sought to represent all who purchased shares of the fund between March 28, 1968, and April 24, 1970. After this Court's holding in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*), *aff'd*, 417 U.S. 156 (1974) (*Eisen IV*), plaintiffs sought a redefinition of the class to exclude those who had sold their shares in the fund. Plaintiffs hoped thus to reduce the cost of the individualized notice to class members which *Eisen III* and *Eisen IV* required plaintiffs to bear, by including the notice in a regular mailing by the fund to its shareholders. At the time when plaintiffs requested the modified class determination, there were approximately 171,000 shareholders of the fund, 103,000 of whom had purchased their shares during the class period; those who had purchased during the class period and subsequently sold their shares—and thus would have been excluded from the class if plaintiffs' proposed modification had been accepted—numbered some 18,000. The defendants opposed the class modification, preferring the broader class definition. By its order, the district court rejected plaintiffs' proposed redefinition of the class and directed that notice be effected by a separate mailing to all class members. Thus to notify a class so defined will cost the plaintiffs $20,000, in comparison to the $5,000 expense which their proposed class definition and method of notice would have entailed. The district court, however, required the fund to shoulder the expense, about $16,000, of extracting from its computerized records the list of the names and addresses of the class members. Defendants appeal from the district court's order insofar as it determined that the lawsuit was properly maintainable as a class action and that defendants should, at their own expense, provide the plaintiffs with the names and addresses of class members.

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A panel of this Court determined that the district court's order was appealable and that the litigation was manageable as a class action. Nos. 75-7608, 75-7610, 75-7611 (2d Cir., June 30, 1976). We do not reconsider these aspects of the panel's decision, and we limit our discussion to the question, answered in the negative by the panel, whether defendants were properly required to bear the cost of furnishing plaintiffs with the list of class members.

Eisen IV held that Rule 23(c)(2), reflecting constitutional principles of due process, *see Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), commands that "individual notice must be provided to those class members who are identifiable through reasonable effort." 417 U.S. at 175. The Supreme Court further held in *Eisen IV* that the representative plaintiff was required to bear the cost of notice:

> "In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class. . . . [T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."

Id. at 178-79. The Court in *Eisen IV* had no occasion to consider which party would bear the cost of determining the names and addresses of those to whom the notice would be sent, because the plaintiff in *Eisen*, unlike the plaintiffs in the instant litigation, was unwilling to bear even the expense of printing and mailing the required notice.

Defendants argue that, since it is prerequisite to sending the notice mandated by *Eisen IV* that plaintiffs obtain the names and addresses of those to whom the notice will be sent, *Eisen* should govern the allocation of the cost of

providing the information. We disagree. In *Eisen*, the plaintiff's effort to impose the costs of notice upon the defendants failed "[i]n the absence of any support under Rule 23." Here, Federal Rule of Civil Procedure 34 provides the basis for requiring the fund, at its own expense, to provide plaintiffs with discoverable information contained in its computerized records.

It hardly requires our extended discussion to establish that the information sought by plaintiffs as to the names and addresses of the members of the class is indeed within the broad scope of permissible discovery established by our Federal Rules. Under Rule 26, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Fed.R.Civ.P. 26(b)(1). The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are "relevant to the subject matter" of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. A list of the names and addresses of the class members would of course be essential to the resolution of that issue. *See Appleton Electric Co.* v. *Advance United Expressways*, 494 F.2d 126, 138 (7th Cir. 1974); *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

Under Rule 34(a), plaintiffs were entitled "to inspect and copy, any designated documents (including . . . data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) . . . ." Rule 34, therefore, provided ample basis for the district court's

order compelling the defendant fund to produce from its computerized records the discoverable information concerning the names and addresses of the class members. The 1970 amendments to the Federal Rules rendered Rule 34 specifically applicable to the discovery of computerized information:

> "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data."

Advisory Committee Note, 48 F.R.D. 459, at 527 (1970).

Defendants argue, however, that because plaintiffs' requests for computerized information require the fund to devise, at a cost in excess of $16,000, a special computer program to extract the names of the class members, plaintiffs should be required to bear the added expense. We acknowledge that Rule 34, coupled with Rule 26(c), allows the district court to shift the expense of special computer programming to the discovering party where the demand for information would impose upon the respondent "undue burden or expense", but we hold that in the instant case the trial judge did not abuse his discretion in declining so to do.

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Rule 33, which defendants contend would dictate a different result, is inapplicable. That Rule provides, in pertinent part:

> "(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

It may well be that where ordinary business records are concerned Rule 33 would generally require that the discovering party bear the expense of data compilation unless for special reason the compilation can be undertaken only by the respondent.[1] However, Rule 33(c) cannot derogate from the general command of Rule 34 that the respondent to a demand for computerized information produce a "reasonably usable" print-out of data contained in a computer's memory. Unlike Rule 34, Rule 33 was not especially tailored to the discovery problems posed by contemporary computer technology.

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[1] We intimate no view as to what the result in the instant case would be if Rule 33(c) were deemed applicable.

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Here, the demand for computerized information creates a necessity for special programming, entailing the substantial expenditure of $16,000 by the fund. Nonetheless, there is no warrant for applying an inflexible rule that the discovering party bear the expense. Computers, which in general make information more readily available, may occasionally make information more difficult to discover. Even where a party adapts his computer software strictly in accordance with legitimate business purposes, complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used. If the information demanded is such as the respondent might reasonably have expected to be required to make available for public examination or for use in the judicial process, it seems not unfair to require production of the information albeit necessitating special programming. In this and other respects, computer technology presents discovery problems with which the courts have developed relatively little familiarity.

The Rules do not leave the courts without power to avoid a litigant's unreasonable appropriation to himself of his opponent's computer resources. "[T]he courts have ample power under Rule 26(c) to protect respondent against undue burden of expense, either by restricting discovery or requiring that the discovering party pay costs." Advisory Committee Note, *supra*, 48 F.R.D. at 527. *See also* Federal Judicial Center, Manual for Complex Litigation ¶ 2.715, at 152 (Tent. Draft July 21, 1976); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2218, at 658-59 (1970). However, the draftsmen of Rule 34 chose—wisely, in light of the relative judicial inexperience with the discovery problems posed by computer technology—not to

burden discovery of computerized information with the more rigid principle of Rule 33(c). The existence of discretion pursuant to Rule 26(c) to reallocate the costs of discovery of computerized information in order to avoid abuse merely underlines the general rule: "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this." *Id.* at 659.[2]

The district court did not err in declining to exercise its discretion pursuant to Rule 26(c) to impose the costs of obtaining the computerized data upon the plaintiffs. Although compliance with the district court's order entails an expenditure by the fund in excess of $16,000, we cannot say the burden thus imposed is unreasonable in light of the nature of the information sought and the extent and character of the fund's business operations. Although an expense of $16,000 seems large in absolute terms, the cost of identifying the name and address of each present or former shareholder who is a member of the class is only thirteen cents. Considering the extent of the fund's business, therefore, the burden of compliance with the Rule 34 discovery demand is not excessive. There is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of business-related information than might be expected of one whose business is small and simple. Great corporations, for example, must expend millions to provide to the government information

[2] Professors Wright and Miller note, "In many instances the peculiarities of computerized information actually will oblige the disclosing party to engage in fairly sophisticated electronic manipulation and analysis of the data in his computer system." *Id.*

necessary to comply with internal revenue laws; an individual taxpayer may provide the required information at a cost to himself of a mere few dollars. It is scarcely unreasonable, moreover, to demand of a respondent that he employ his computer resources to provide discoverable information of a relatively simple nature where, as here, the respondent makes extensive use of computers in the operation of its business.

The order of the district court allocating the costs of discovery of the computerized names and addresses of the class members was not unreasonable, moreover, in light of the district court's definition of the class. The plaintiffs sought to redefine the class to exclude former shareholders of the fund, so that the individualized notice mandated by *Eisen IV* could be inserted, at small expense, in one of the fund's regular mailings. The defendants opposed the class redefinition and the proposed method of notice on the grounds, respectively, that the more restrictive class definition would exclude potential class members as to whom the legal and factual issues would be similar to those raised by plaintiffs,[3] and that the proposed notice to all the fund's shareholders would prejudice the fund by notifying even

[3] Accordingly, defendants might have been bound by collateral estoppel if they lost on the merits, but, if the defendants won, they would not have been entitled to assert *res judicata* against the former shareholders who were not class members. *Compare Neaderland* v. *Commissioner*, 424 F.2d 639, 642 (2d Cir.), *cert. denied*, 400 U.S. 827 (1970) (collateral estoppel), *with Saylor* v. *Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968) (*res judicata*).

On the other hand, the issues presented might have been somewhat different for those who had sold their shares than for those who were still shareholders; the members of the former group might not have been damaged by the alleged overevaluation of the fund's net assets.

those shareholders not involved in the litigation.[4] The district court rejected plaintiffs' proposed redefinition of the class. Plaintiffs, accordingly, are required to bear an expense of $20,000 to notify the class, in comparison to the $5,000 cost which plaintiffs had contemplated. But the district court declined to impose on plaintiffs the added cost of discovering the names and addresses of the class members, which cost was occasioned by the court's agreement with defendant that the fund would have been harmed by the proposed class redefinition. The considerations advanced by the defendant in opposition to plaintiffs' proposed class redefinition were undoubtedly entitled to some weight; still, they did not *require* the class definition ultimately accepted by the district court.[5] *See Eisen IV*, 417 U.S. at 179 n. 16 and *Eisen III*, 479 F.2d at 1023 (Oakes, *J.*, dissenting from denial of rehearing en banc) (raising possibility that class may be divided into subclasses pursuant to Rule 23(c)(4) so as to minimize cost of notice borne by representative plaintiff). *Cf. Eisen III*, 479 F.2d at 1009 n.5 (suggesting that notice may be included in regular mailing by defendant to class members). As such, we are not disposed to hold that the district court's refusal to impose on plaintiffs the cost of discovery of the computerized names and addresses was an abuse of its discretion. Indeed, the order of the district court accommodated the competing interests in a manner which was fair and imaginative.

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[4] However, under Rule 23(c)(2) the district court could have supervised the form of notice included in one of the fund's regular mailings, so as to avoid undue prejudice to the fund. In any event, the fund has already notified its shareholders on many occasions of the pendency of this litigation.

[5] *See* notes 3-4 *supra*.

We note, finally, that our affirmance of the district court's order is without prejudice to a claim by the defendant fund for discretionary taxation of the cost of discovery against plaintiffs, should the plaintiffs ultimately lose. *See* 15 U.S.C. §§ 77k(e), 77ooo(e) and 78i(e); Fed. R. Civ. Pro. 54(d). If plaintiffs' suit proves frivolous, their attorneys might be held liable for the cost of discovery which, defendant fund is now required to bear. 28 U.S.C. § 1927. Plaintiffs have represented that they are unwilling to bear the cost of discovery of the names and addresses of the class members. However, their present unwillingness to pay this cost does not immunize them from a judgment for costs, nor does it necessarily diminish the deterrent effect of such a judgment against a strike suit.[6] The mere possibility that plaintiffs may prove to be judgment-proof does not affect our decision, since here, unlike in *Eisen*, there is a basis in the Federal Rules for imposition of the cost of discovery on the defendant fund. *Cf. Eisen III*, 479 F.2d at 1020 (Hays, *J.*, concurring).

Affirmed.

MULLIGAN, *Circuit Judge* (dissenting):

Ironically enough, the majority states that its holding is compelled by *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) *(Eisen IV)* and Rule 23(c)(2) although the Court in that case construed the rule to require the representative plaintiffs to pay the costs of notifying the prospective class of the pending action. The majority

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[6] The requirement that plaintiffs bear the $20,000 expense of notifying the class is itself a formidable deterrent to frivolous litigation, for, if plaintiffs lose, they cannot recover their disbursements.

reaches this result by finding that the plaintiffs, who admittedly are only seeking the list of names and addresses of the potential plaintiff class in order to notify them of the pending action, are seeking instead a discovery which makes the cost allocable to the defendants in the discretion of the district court thus circumventing Rule 23 and *Eisen IV*. The majority then proceeds to find no abuse of discretion by the district court in foisting the special computer programming cost upon the defendant fund. Since the only purpose of obtaining the required information is to notify the class as mandated by Rule 23, *Eisen IV* compels the conclusion that the cost of such notification be borne initially, at least, by the plaintiffs. The majority forces the defendant to subsidize the suit against them, a result which is aberrant to our jurisprudence and to the extent that it depends upon the premise that the defendant has greater financial resources is further in conflict with *Eisen IV*. In sum, we believe Judge Palmieri's opinion for the panel properly disposed of the issue now before us en banc.[1]

I

In *Eisen IV* the Court stated, "The usual rule is that a plaintiff must initially bear the cost of notice to the class." Id. at 178. The majority does not claim that this

[1] Hon. Edmund L. Palmieri, United States District Judge for the Southern District of New York, sat by designation on the original panel and was the author of the majority decision. Slip op. 4577 (2d Cir. June 30, 1976). Fed. R. App. P. 35, which provides for en bancs, makes no allowance for the participation of members of the original panel who are not judges of the Court of Appeals. Thus, Judge Palmieri has not participated in this en banc consideration.

case falls outside the usual rule.[2] Instead, the majority has decided that obtaining the names and addresses of the prospective class is not part of the notification process mandated by Rule 23(c)(2) but is rather within a discovery process governed by an amalgam of Rules 26(b)(1) and 34. As a matter of logic this is bewildering. The only purpose of the plaintiffs here in obtaining the data is to notify the class; it is an essential and unavoidable step in the notice giving process. As Judge Palmieri observed "the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes." Panel slip op. at 4587. The majority now creates in effect a bicephalous rule which is anomalous. The cost of printing, stuffing and postage of the notice *must* be borne by the plaintiffs but the cost of obtaining the names and addresses to put on the envelopes *may* be thrust upon the defendants in the discretion of the trial bench. As *Eisen IV* held, "the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." 417 U.S. at 179. We cannot appreciate how it can be reasonably held that the expense incurred in producing the list of addresses is distinguishable from the expense of preparing and mailing the notice.

[2] In *Eisen IV* the Court noted that the district court in allocating the cost of notification between the parties had relied on cases where a fiduciary duty had pre-existed between the plaintiff and the defendant. While finding none in *Eisen IV* the Court expressed no opinion as to whether the usual rule would be followed in such cases. 417 U.S. at 178 n.15. Plaintiffs had argued before the panel that they were in a fiduciary position with the defendants and that therefore the possible loophole in *Eisen IV* applied. Judge Hays, dissenting in the panel opinion, espoused that position but it has been understandably abandoned in the en banc majority opinion.

Appendix E

The majority cites no authority at all for its novel position except to claim that the result is mandated by Rule 23 and *Eisen IV*. But Rule 23(c) requires the district court to direct "the best notice practicable under the circumstances, including *individual* notice to all members who *can be identified* through reasonable effort." (Emphasis supplied). This language would clearly indicate that the draftsmen of the rule made no distinction between the identification of the class and the notification of individual members. Notification posits identification which is an inseparable part of the process.

How then does *Eisen IV* compel a result which seemingly contradicts its holding? This is the crucial point in the majority holding since it is the basis for the determination that the discovery Rule 34 is applicable and not Rule 23. The majority finds that it "hardly requires our extended discussion" to establish that the list sought is within the scope of permissible discovery established by the rules. Its reasoning is as follows:

> Under Rule 26(b), "[p]arties may obtain discovery regarding any matter . . . relevant to the subject matter involved in the pending action . . . ." Fed. R. Civ. P. 26(b)(1). The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are "relevant to the subject matter" of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. A list of the names and addresses would of course be essential to the resolution of that issue.

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This is an exercise in sophistry and not syllogistic reasoning. No one questions that Rule 23 mandates that the plaintiffs have the obligation to notify the class and the majority in that part of the opinion we have excerpted admits that a list of the names and addresses is an essential step in the required notification. How then can it avoid the holding of *Eisen IV* that such costs must be assumed by the plaintiffs? The *deus ex machina* employed is discovery under Rule 34. We do not maintain that discovery in class action cases is limited to the search for evidence or leads relevant to the substantive merits of the underlying controversy. It properly may encompass inquiry to determine whether class action requirements can be satisfied.[1] However, that was not the purpose of the plaintiffs here. The district court has certified the class and found that the action was properly maintainable as a class action. The panel unanimously agreed and no one in the en banc panel disagrees. There is no issue as to numerosity or a predominance of common questions of law or fact. The plaintiffs have never sought discovery relief under Rule 34. In the memoranda submitted by the plaintiffs to Judge Griesa prior to his opinion below there is no mention of Rule 34. Judge Griesa expressly and correctly perceived the issue as being "who is to bear certain expenses connected with the giving of notice." *Sanders* v. *Levy*, 69 Civ. 1242, Slip op. at 2 (S.D.N.Y. May 15, 1975).

No party here, certainly not the plaintiffs, is seeking "discovery" as a method of determining whether notice

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[1] See Annot., Discovery for Purposes of Determining Whether Class Action Requirements Under Rule 23(a) & (b) of Federal Rules of Civil Procedure Are Satisfied, 24 ALR Fed. 872 (1975). Here, of course, it has already been determined that the requirements for the class action have been satisfied.

has "properly" been sent. Plaintiffs are not anticipating potential issues and seeking discovery to maintain a position. They were avowedly and quite simply seeking the list to notify the class under Rule 23. Should any issue arise as to "proper notification", e.g., was the list complete, was the notice appropriate, was the postage adequate, presumably it would be raised by a putative member of the class but not *in limine* by the plaintiffs who are required to notify and pay the costs of notification under *Eisen IV*.

The raw tape data from which the proper list can be ascertained is fully available to the plaintiffs. The only issue is who is to pay the expense of the special programming necessary to make it usable. The names and addresses which will be so produced will be equally accurate no matter who pays the cost. Since the obligation of proper notification is admittedly on the plaintiffs we cannot understand by what alchemy the majority decides that the cost becomes attributable to the defendant. We can only conclude that the majority while purporting to follow *Eisen IV* is in fact flouting its holding.[4]

II

Having decided that the notification required by Rule 23 has been somehow transmogrified by *Eisen IV* into a discovery procedure not governed by Rule 23, the majority proceeds to find no abuse of discretion in requiring the defendant fund to finance the suit against it, by relying

[4] We note that in *Eisen IV* the petitioner's brief argued, "Subjecting Respondents to the cost of notice does not differ in effect from requiring parties to make substantial expenditures to comply with discovery orders . . . ." Petitioner's brief at 40-41. The same argument was advanced on oral argument before the Supreme Court, 42 U.S.L.W. 3493. The Court did not even dignify this argument by any discussion in its opinion.

on two factors which it finds persuasive. In rejecting the "inflexible" rule espoused by the Supreme Court, the majority then proceeds to impose its own by holding that there is no injustice in requiring one whose business is vast and complex to pay the substantial costs involved, while suggesting that the result might be different if the defendant's business was small and simple. But class actions for damages are invariably brought against those who are relatively opulent and affluent in comparison with the plaintiffs. This is inherent in the theory of the action. The impecunious or those of modest means are seldom if ever the target of such damage actions. The deeper pocket is invariably in the trousers of the defendant. This consideration moreover was expressly rejected in *Eisen IV* where the Court stated, "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U.S. at 176. The majority's attempt to transmute notification into discovery, as we have indicated, is totally unpersuasive.

The labored reasoning of the majority becomes evident in the analogy it draws. The majority argues that great corporations must expend millions to provide the government with information necessary to comply with the internal revenue laws. The information thus sought, however, is to determine whether there has been any violation of those laws and the retention of such records and data is imposed by those laws. But what law demands that the defendant maintain lists of past and present customers who might in the future band together to sue the corporation in some class whose perimeters will be fixed by the accidents and exigencies of possible litigation? There is no question that the information sought here has nothing to do with the merits of the underlying action. Nor is it

relevant to determine whether the class action is properly maintainable. It is sought simply for notification purposes and not discovery in any sense in which that process has ever been defined. Moreover, the data is available if the plaintiffs are willing to assume the burdens, as well as the benefits, of the class action they have initiated. To require corporate defendants to so arrange their computer programming as to anticipate the endless variety of prospective classes which might some day bring class actions is, of course, unrealistic and not required by any law we know of until this decision which hopefully will be short lived.

The second consideration stressed by the majority is that when the plaintiffs sought to redefine by excluding some 18,000 investors the class they had initially selected, the defendants opposed the attempt. This resulted in a higher cost than would have resulted if the plaintiffs had been successful in reducing the class. Thus as the majority seems to view the matter, the defendant fund has somehow brought the burden of spending $16,580 at 1973 levels upon its own head. But the district court found that the exclusion of the 18,000 "would involve an arbitrary reduction in the class," since these people "logically belong in the class." *Sanders* v. *Levy*, 69 Civ. 1242, Slip op. at 7, 10 (S.D.N.Y. May 15, 1975). The determination of the scope of the class was on the merits. We cannot agree that by opposing an improper class a defendant thus becomes liable for any increased costs of notification. The class cannot become proper only if the defendant bears the cost of notifying the members. If this is to be the law the opportunities for abuse become obvious.[5]

[5] The majority does not make clear what weight the district court is to attribute to either the wealth factor or opposition-by-defendant-to-size-of-class factor in determining who should bear the cost. Is one factor sufficient or must both be present? It does seem clear that the court is limiting its holding to those cases involving computer technology and Rule 34 and not business records under Rule 33. We expect that until the Supreme Court intervenes, this court will be asked to further rule on this issue. The burden is not inconsiderable. There were 176 class actions filed in the Southern District of New York alone in fiscal 1976 and at the end of fiscal 1976, 408 class actions were pending in that district. There were 724 pending at that time in all the districts of this Circuit. Total filings of class actions in United States courts increased from 2,717 in 1974 to 3,584 in 1976 with 5,987 pending at the end of fiscal 1976. Administrative Office of the United States Courts, 1976 Annual Report of the Director 117-24.

The majority is not totally insensitive to the obvious inequity of requiring the defendant to finance the class action brought against it. It suggests that if the plaintiffs ultimately lose discretionary costs "might" be assessed against them. But this is unrealistic. The plaintiffs have consistently maintained that they cannot afford to pay the $16,580 costs entailed. Their average stake in the litigation is in the range of $2 to $24. The prospect of defendant obtaining reimbursement is dim indeed. The further suggestion that the costs may be recouped from counsel to the plaintiffs is admitted only as a possibility if the suit is found to be frivolous. If it is simply unsuccessful on the merits there is no hope at all of reimbursement. On the other hand, if the plaintiff class is successful there is no question that the prevailing parties will be entitled to costs, Fed. R. Civ. P. 54(a). Cost transference at this stage of the litigation therefore is hardly justified by the highly doubtful recoupment possibilities envisaged by the majority in derogation of the normal principles reiterated in *Eisen IV*.[6]

[6] The imposition of the cost of giving notice upon the plaintiff has apparently not proved any great hindrance to class actions. See Note, The Rule 23(b)(3) Class Action: An Empirical Study,

Appendix E

Although responsible commentators have indicated that class actions for damages have in fact become a financial bonanza only for the attorneys and not for members of the class and have, in effect, converted the federal courts into small claims courts,[7] a burden not inconsiderable in days of overcrowded calendars and apparently not alleviated by *Eisen IV*, see notes 5 & 6, we do not rest our decision at all on that basis. Nor do we rest it on our recognition which is implicitly shared by the majority that strike suits may be encouraged by the added prospect of obtaining settlements of non-meritorious claims because of the increased cost of defending them. Rather we base our dissent on the ground that the costs involved here are unquestionably costs of notification which must be borne by the plaintiffs under Rule 23 and therefore are clearly within the rule of *Eisen IV*. The strained attempt to convert notification into Rule 34 discovery is conceptually unsound and unprecedented. We would therefore adhere to the well-reasoned opinion of Judge Palmieri for the panel.

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62 Geo. L.J. 1123, 1145-48 (1974); Developments in the Law—Class Actions, 89 Harv. L.R. 1319, 1434 n.223 (1976) as well as the statistics set forth in note 5 *supra*.

[7] *Free World Foreign Cars, Inc.* v. *Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 30 (S.D.N.Y. 1970) (Weinfeld, *J.*); H. Friendly, Federal Jurisdiction: A General View 119-20 (1973). In this action the interests of the class members, as we have indicated, range from $2.00 to $24.00.

APPENDIX F

Statutes and Rules Involved

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23(a)-(d), 28 U.S.C., *Class Actions.*

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the

class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present

claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

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Rule 26(b)(1), (c), 28 U.S.C., *General Provisions Governing Discovery.*

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(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not priviliged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court

in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

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Rule 33(c), 28 U.S.C., *Interrogatories to Parties.*

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(c) *Option to Produce Business Records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination,

audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

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Rule 34, 28 U.S.C., *Production of Documents And Things And Entry Upon Land For Inspection And Other Purposes.*

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the

action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.